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**REPORTS**  
**OF**  
**CASES DECIDED**  
**IN THE**  
**APPELLATE COURT**  
**OF THE**  
**STATE OF INDIANA**

**WITH TABLES OF CASES REPORTED AND CITED, TEXT-  
BOOKS CITED, STATUTES CITED AND CONSTRUED, AN  
INDEX, AND NOTES TO THE REPORTED CASES.**

---

**PHILIP ZOERCHER,**  
◦ **OFFICIAL REPORTER**  
**NORMAN E. PATRICK, Assistant Reporter,**

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**VOL. 60**  
**CONTAINING CASES DECIDED AT THE MAY TERM, 1915, NOT  
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**JUDGES**  
**OF THE**  
**APPELLATE COURT**  
**OF THE**  
**STATE OF INDIANA**

**WHOSE OPINIONS ARE CONTAINED IN THIS VOLUME.**

---

HON. JOSEPH G. IBACH.\*¶  
HON. EDWARD W. FELT.\*\*¶  
HON. FRED S. CALDWELL.†  
HON. JAMES J. MORAN.††  
HON. MILTON B. HOTTEL.¶  
HON. JOSEPH H. SHEA.‡§

\*Chief Justice November Term, 1915.

\*\*Presiding Judge at November Term, 1915.

†Chief Justice at May Term, 1915.

¶Elected in 1910, and reelected in 1914.

§Elected in 1912.

†Appointed September 1, 1913, and elected in 1914.

††Appointed February 10, 1915.

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CASES DECIDED  
IN THE  
**APPELLATE COURT**  
OF THE  
STATE OF INDIANA,  
AT INDIANAPOLIS, MAY TERM, 1915, AND NOVEMBER  
TERM, 1915, IN THE NINETY-NINTH AND ONE  
HUNDREDTH YEARS OF THE STATE.

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**WARD ET AL. v. PERRY.**

[No. 8,826. Filed October 29, 1915.]

1. **JUSTICES OF THE PEACE.—Jurisdiction.—Dismissal.**—In view of §1721 Burns 1914, §1433 R. S. 1881, limiting the jurisdiction of justices of the peace in actions on contracts or torts to cases where the amount demanded does not exceed \$200, a circuit or superior court can acquire no jurisdiction on appeal from the judgment of a justice of the peace in an action where the amount demanded exceeds \$200, and should dismiss the appeal. p. 3.
2. **JUSTICES OF THE PEACE.—Jurisdiction.—How Determined.**—The amount declared or demanded, and not the amount due, determines the question of whether a justice of the peace has jurisdiction of the subject-matter of an action under §1721 Burns 1914, §1433 R. S. 1881. p. 3.
3. **JUSTICES OF THE PEACE.—Jurisdiction.**—Where the complaint in an action before a justice of the peace was in three paragraphs, in each of which the recovery of an unliquidated claim was sought, and in the last of which the amount claimed by virtue of the causes alleged in all the paragraphs was restricted to \$200, the justice had jurisdiction of the subject-matter, notwithstanding the amount of damages alleged in each paragraph, when combined, exceeded the amount fixed as the limit of jurisdiction by §1721 Burns 1914, §1433 R. S. 1881. p. 6.
4. **PLEADING.—Complaint.—Sufficiency.—Initial Attack on Appeal.**—An original attack on appeal made against a complaint consisting of more than one paragraph could not prevail if either paragraph was good. p. 6.
5. **TRESPASS.—Action.—Complaint.—Sufficiency.**—Where each paragraph of complaint was based upon a trespass committed by defendants' live stock upon the premises of plaintiff, an allegation of plaintiff's freedom from fault was not necessary, and, even if requisite, was supplied by the averment that plaintiff did all that he could to prevent the injury complained of. p. 6.

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Ward v. Perry—60 Ind. App. 1.

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6. APPEAL.—*Review.—Evidence.—Sufficiency.*—The evidence is sufficient to sustain the decision of the trial court in favor of plaintiff where it appears that there was some evidence supporting every material allegation of the complaint. p. 7.

From Superior Court of Madison County; *H. Clarence Austill*, Judge.

Action by William R. Perry against Louisa G. Ward and another. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

*Jesse E. Hall* and *Kittinger & Diven*, for appellants.

*James A. May*, for appellee.

MORAN, J.—Appellee was awarded judgment against appellants in the lower court for the sum of \$187.50, for grain consumed and growing crops destroyed by appellants' live stock. The action originated before a justice of the peace of Monroe Township, Madison County, Indiana, and reached the Superior Court of Madison County on appeal. At the very onset, this cause presents for our consideration the question as to whether the justice of the peace before whom the cause was originally filed and tried had jurisdiction of the subject-matter.

The complaint was in three paragraphs. The first paragraph, after setting forth the time, place and character of the damages alleged to have been done to appellee's crops by appellants' live stock, further alleges in substance that the crop destroyed was of the fair and reasonable value of \$25, and that appellee was damaged in said sum, for which judgment was demanded. The second paragraph of complaint in so far as it relates to the injury alleged to have been committed by appellants' live stock to appellee's property, alleges in substance that appellee was damaged in the sum of \$200, and that the reasonable value of the property so destroyed and con-

sumed was \$200, which was due and unpaid and for which judgment was demanded on this paragraph. The third paragraph, after alleging a similar injury as set forth in the second paragraph of complaint and damages by reason thereof in the sum of \$200, further in substance alleges that all the property so injured and destroyed by appellants' animals on the premises in the possession of appellee was his property and was of the reasonable value of \$200, for which he demands judgment on this paragraph, and concludes for judgment on all paragraphs for \$200.

So much of the statute as is material to a presentation of the question here involved reads: "Justices of the peace shall have jurisdiction to try

1. and determine suits founded on contracts or torts, where the debt or damage claimed or the value of the property sought to be recovered does not exceed one hundred dollars and concurrent jurisdiction to the amount of two hundred dollars." §1721 Burns 1914, §1433 R. S. 1881.

It is elementary that, if the justice of the peace had no jurisdiction of the subject-matter, then the Superior Court of Madison County could not have acquired jurisdiction on appeal, and the motion to dismiss for a want of jurisdiction should have been sustained. *Second Nat. Bank v. Hutton* (1881), 81 Ind. 101; *Elgin v. Mathis* (1894), 9 Ind. App. 277, 36 N. E. 650.

The adjudicated cases are not free from confusion as to the proper method of ascertaining whether the amount involved exceeds or is within the

2. amount for which the justice of the peace has jurisdiction; but out of the authorities may reasonably be adduced a general rule that the amount declared or demanded and not the amount due determines the jurisdiction of the justice of the

peace. *Mitchell v. Smith* (1865), 24 Ind. 252; *Elgin v. Mathis*, *supra*; *Calloway v. Byram* (1884), 95 Ind. 423; *Everett Piano Co. v. Bash* (1903), 31 Ind. App. 498, 68 N. E. 329; *Decker v. Graves* (1894), 10 Ind. App. 25, 37 N. E. 550; *State, ex rel. v. Forry* (1878), 64 Ind. 260; *Guard v. Circle* (1861), 16 Ind. 401; *Albaugh Bros. Dover Co. v. White* (1910), 26 Okl. 24, 108 Pac. 360, Ann. Cas. 1912 A 1283. In *Short v. Scott* (1855), 6 Ind. 430, where the damages sought were for the killing of two dogs and a deer, on three counts respectively, the aggregate amount sued for in the three counts exceeded the jurisdiction of the justice of the peace, but the concluding amount demanded was \$50, which was the limit under the statute at that time for an action of this character. It was held that the cause came within the jurisdiction of the justice of the peace following the case of *Wetherill v. Inhabitants, etc.* (1840), 5 Blackf. 357, wherein it was said, "In assumpsit, and other actions sounding in damages, the sum laid in the conclusion of the declaration constitutes the amount of plaintiff's claim." In *Pate v. Shafer* (1862) 19 Ind. 173, an action was commenced before a justice on an account claiming a balance due of \$62.46. The defendant filed a set-off of various items amounting to \$500, but claimed judgment not to exceed \$100. The court said, "In the complaint, the amount demanded in the conclusion is the criterion of the jurisdiction." Here the defendant claimed judgment in an amount not to exceed \$100, which brought the cause within the jurisdiction of the justice of the peace. "The mere fact that the cause of action arises out of a demand whose total sum exceeds the jurisdictional limit, will not prevent the attacking of the jurisdiction, providing the real amount due in the particular case is alone claimed." 1 Ency. Pl. and

Pr. 715; *Second Nat. Bank v. Hutton, supra*. In *Brown v. Cain* (1881), 79 Ind. 93, judgment was taken by default in the sum of \$200 on a note, which with interest exceeded \$200. The demand was for \$200. It was held that the cause of action was within the jurisdiction of the justice of the peace, the court saying, "It does not appear that the plaintiff in the action claimed more than two hundred dollars." In *Elgin v. Mathis, supra*, the court held that where an action is brought on an account where the only complaint is the account itself, which showed that the amount due exceeded the jurisdiction, and the demand was in no way limited, the court should sustain a motion to dismiss. But when a complaint is filed on an account and a bill of particulars is filed therewith, and the amount shown to be due in the bill of particulars exceeds the jurisdiction, while the demand in the complaint does not, the amount demanded in the complaint determines the question of jurisdiction. So even where a cause of action is based upon a bill of particulars, the amount for which judgment is sought or the demand claimed constitutes and is the criterion. *Decker v. Graves, supra*; *Calloway v. Byram, supra*; *Murphy v. Evans* (1859), 11 Ind. 517. In *Everett Piano Co. v. Bash, supra*, it was held that where the plaintiff was permitted to amend his complaint by changing the amount of the value of the instrument, for which the action is brought, from \$250 to \$400, but where the amount demanded was \$200, that it was within the jurisdiction of the justice of the peace. In *State, ex rel. v. Forry, supra*, 263, one paragraph of complaint demanded a recovery of personal property valued at \$50 and \$50 damages for the detention thereof, another paragraph demanded judgment for \$106 additional for money embezzled. Judgment was rendered for \$156. It was held that

the amount claimed exceeded the justice's jurisdiction, and in doing so, the court made use of the following language: "In the case we are considering the amount claimed as to the value of the property sought to be replevied, was fifty dollars, the amount of damages claimed for its detention was fifty dollars, and the amount claimed in the second paragraph of complaint for embezzlement was one hundred and six dollars additional, making a sum total of two hundred and six dollars, the claim for which amount is not restricted in any part of the complaint."

In the case at bar the amount claimed is restricted to the sum of \$200, at the close of the last paragraph of the complaint. The claim

3. sought to be reduced to judgment in each paragraph of the complaint was unliquidated and, when considered in the light of the authorities and the language at the close of the last paragraph of complaint, we have reached the conclusion that the justice of the peace had jurisdiction to hear and determine the cause and no error was committed in overruling the motion in the superior court to dismiss the cause for want of jurisdiction.

It is urged that the complaint is fatally defective because it does not allege that appellee was free from fault. The complaint, it will be

4. remembered, is in three paragraphs, and the attack is an original one in this court and cannot prevail if there is one good paragraph of complaint, although the other paragraphs might be defective. It is alleged in appellee's third

5. paragraph of complaint that he did all that he could to prevent such injury and destruction of the property and the crops destroyed. This is a sufficient allegation if such allegation is necessary, and renders the complaint impervious to the



infirmity pressed. Elliott, App. Proc. §474. And further, we might add that each paragraph of the complaint is based upon a trespass committed by appellants' live stock upon appellee's premises, and it was unnecessary for appellee to allege that he was free from fault. *Atkinson v. Mott* (1885), 102 Ind. 431, 26 N. E. 217.

An examination of the record discloses that there is some evidence supporting each material allegation of the complaint, hence there was no er-

6. ror committed by the court in overruling appellant's motion for a new trial on the ground that the decision of the court was not supported by sufficient evidence. *Williams v. Huffman* (1906), 39 Ind. App. 315, 76 N. E. 440.

After a consideration of each of the errors presented by appellants, we find no cause for reversal. Judgment affirmed.

NOTE.—Reported in 109 N. E. 936. Amount claimed as amount due as determining jurisdiction of justice of peace, see Ann. Cas. 1912 A 1284. See, also, under (1) 24 Cyc 641; (2) 24 Cyc 464; (3) 24 Cyc 465, 466; (4) 3 C. J. 788; 2 Cyc 691; (5) 3 C. J. 145, 146; 2 Cyc 411; 38 Cyc 1078; (6) 3 Cyc 348, 360.

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### EVERLY ET AL. v. BALL ET AL.

[No. 8,608. Filed April 16, 1915. Rehearing denied October 5, 1915. Transfer denied November 3, 1915.]

1. CONTRACTS.—*Action.—Complaint.—Sufficiency.*—A complaint showing that plaintiffs furnished to defendants, contractors for a school building, certain materials under a contract whereby defendants were to deliver in payment a valid warrant on the township, and that a warrant for the specified amount was delivered to plaintiffs with representations that it was a valid warrant, but that at the time of its issuance the indebtedness of the township exceeded the constitutional limit, so that the warrant was invalid and created no indebtedness against the township, all of which defendants knew, and of which the plaintiffs were ignorant at the time of accepting such warrant, and seeking to recover the value of such materials, was sufficient on demurrer as against the objection that it

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did not show a township indebtedness in excess of the limit at the time the debt to plaintiffs was created, and that there was not at that time sufficient money in the treasury of the township to pay same. p. 11.

2. PAYMENT.—*What Constitutes.*—The delivery of a township warrant and its acceptance by plaintiffs in ignorance of the fact that it was invalid and created no liability against the township, was not a payment by defendants for materials furnished under an agreement that they were to pay for same by the delivery of a valid and merchantable warrant on the township. p. 13.

From Marshall Circuit Court; *Harry Bernetha*, Judge.

Action by Elijah Ball and another against William Everly and another. From a judgment for plaintiffs, the defendants appeal. *Affirmed.*

*Harley A. Logan*, for appellants.

*Charles Kellison*, for appellees.

MORAN, J.—Appellees, Elijah Ball and George Ball, doing business under the firm name of Ball & Son, recovered a judgment in the Marshall Circuit Court for \$2,056.17, on an indebtedness alleged to be due them from appellants, William Everly and William L. Wallace, partners doing business under the firm name of Everly & Wallace.

In the month of September, 1908, appellants were awarded a contract for the construction of a school building at the town of Orland, Millgrove Township, Steuben County, Indiana. By virtue of a contract appellees agreed to furnish to appellants the mill work to be used in the construction of the building. The questions presented for consideration grow out of this contract. The complaint is in two paragraphs. It is sufficient to say as to the first paragraph that it is upon the common count for merchandise sold and delivered by appellees to appellants at their special instance and request. The second paragraph pleads the facts specifically; the material allegations are: In October, 1908, ap-

pellees sold appellants certain articles of trimmings, staircases, window jambs, doors, inside and outside fixtures and furnishings, and other articles set forth in a bill of particulars for the sum of \$1,785.62, to be delivered at the town of Orland, Indiana, as soon as possible. The sum of \$1,725 was to be paid in good legal warrants of Millgrove Township, Steuben County, Indiana, and the balance of the purchase price less freight charges, to be paid in lawful money. The material was delivered and accepted by appellants in accordance with this agreement. On December 30, 1908, appellants attempted to deliver to appellees a certain warrant on Millgrove Township, in the sum of \$1,725, bearing that date. The total assessed value of taxable property of Millgrove Township for 1908, was \$582,830, and the indebtedness on December 30, 1908, was in excess of \$13,525. The warrant was wholly void and was not a warrant of Millgrove Township, for the reason that the sum of \$1,725 named in the warrant was in excess of the lawful indebtedness of Millgrove Township, when added to its existing indebtedness. By the terms of the agreement entered into between appellants and appellees, appellants agreed to deliver to appellees good and valid warrants on Millgrove Township in the sum of \$1,725, which they have failed to do, and have failed to pay appellees the sum of \$1,785.62. At the time of making the contract appellants represented that the warrants issued by Millgrove Township were perfectly good and merchantable, and that banks and business men in Indiana were accepting and cashing the same; that they were gilt-edged securities, and if appellees would accept the warrant for \$1,725, they could readily cash it without danger of any loss. Appellees were at the time nonresidents of the State of Indiana, and wholly ignorant of the

financial condition of Millgrove Township, or its taxable property and indebtedness. Appellees believed the representations made and relied upon the same and agreed to accept said pretended warrant believing it to be a good and lawful warrant of the township. At the time of making the representations and the delivery of the pretended warrant, appellants well knew that appellees were ignorant that the warrant was without value. And appellants further knew that appellees in accepting the warrant did so, relying upon the false and fraudulent representations of appellants that the warrant was good and legal. After the delivery of the pretended warrant, appellees made diligent effort to cash the same without success, and this was the first information they had that the warrant was without value, and was not the legal warrant of Millgrove Township. On October 7, 1909, appellees tendered the pretended warrant to appellants and demanded the sum of \$1,725 or a legal warrant. Appellants refused to pay the claim or to deliver the warrant as demanded, and have ever since refused to pay the claim or deliver the warrant. There is due appellees from appellants upon the agreement and because of said false representations the sum of \$2,000.

The errors assigned are: (1) the court erred in overruling appellants' demurrer to the second paragraph of appellees' complaint; (2) the complaint does not state facts sufficient to constitute a cause of action against either or both of appellants; (3) the court erred in overruling appellants' motion in arrest of judgment. The second and third assignments of error have been waived by appellants, and this leaves for consideration the sufficiency of the second paragraph of complaint when tested by a demurrer for the want of facts.

Appellees contend that the paragraph of com-

plaint discloses that appellants were to deliver to them in part payment for the material to be furnished, a valid warrant on Millgrove Township, Steuben County, Indiana, and on which they could realize the sum of \$1,725. But instead, after furnishing the material aforesaid, there was placed in their hands a warrant, which created no indebtedness against the township by reason of the fact that the debt evidenced by the warrant was in excess of the limitation fixed by the Constitution of the State of Indiana. Our State Constitution was amended in 1881 as to the limitation of indebtedness to be contracted by a political or municipal corporation as follows: "No political or municipal corporation in this State shall ever become indebted, in any manner or for any purpose, to an amount, in the aggregate exceeding two per centum on the value of the taxable property within such corporation, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness; and all bonds or obligations, in excess of such amount, given by such corporation, shall be void: *Provided*, That in time of war, foreign invasion, or other great public calamity, on petition of a majority of the property owners, in number and value, within the limits of such corporation, the public authorities in their discretion, may incur obligations necessary for the public protection and defense to such an amount as may be requested in such petition." Art. 13, §1, Constitution. On the part of the appellants it is earnestly contended that to make the paragraph of complaint sufficient to withstand a demurrer for want of facts, it must disclose by proper averment that at the time the indebtedness represented by the warrant was created, which was a month before the warrant was issued, there was not at that time sufficient money in the

treasury to pay the same; and that the debt sought to be created exceeded the limitation as fixed by the Constitution; and that the true test is, What was the indebtedness at the time the debt was created, and not when the warrant was issued? In other words, it is contended that the debt was not created by the issuing of the warrant within the meaning of the provisions of the Constitution. In support of this contention, the following decisions are cited by appellants: *City of Laporte v. Gamewell, etc., Tel. Co.* (1896), 146 Ind. 466, 45 N. E. 588, 58 Am. St. 359, 35 L. R. A. 686; *Brashear v. City of Madison* (1895), 142 Ind. 685, 36 N. E. 252, 42 N. E. 349, 33 L. R. A. 474; *City of Logansport v. Jordan* (1908), 171 Ind. 121, 85 N. E. 959; *Graham v. City of Spokane* (1898), 19 Wash. 447, 53 Pac. 714; *Sackett v. City of New Albany* (1883), 88 Ind. 473, 45 Am. Rep. 467; *City of Valparaiso v. Gardner* (1884), 97 Ind. 1, 49 Am. Rep. 416; *French v. City of Burlington* (1876), 42 Iowa 614; *Crogster v. Bayfield County* (1898), 99 Wis. 1, 74 N. W. 635, 77 N. W. 167; *City of East St. Louis v. Flannigan* (1887), 26 Ill. App. 449; *Ness v. Board, etc.* (1912), 178 Ind. 221, 98 N. E. 33, 1002; *Beard v. City of Hopkinsville* (1894), 95 Ky. 239, 24 S. W. 872, 44 Am. St. 222, 23 L. R. A. 402; *Dively v. City of Cedar Falls* (1869), 27 Iowa 227.

An examination of each decision cited above discloses that they present either directly or indirectly a controversy between individuals and the municipality. A majority of them are where taxpayers enjoin the municipality from entering into contracts, which would create an indebtedness beyond the limitation fixed by the Constitution. None of the decisions cited involves the principle under consideration in this cause. This is not a suit by a taxpayer seeking injunctive relief, nor an action at law

to enforce a claim or demand against the township. Appellees did not contract with the township to furnish the material for the school building described in the complaint, and for which they seek a recovery. They contracted with appellants and appellants agreed to pay appellees in part by a township warrant.

It is alleged that the total assessed value of the taxable property of Millgrove Township for the year 1908 was \$582,830, and that the total indebtedness of the township on December 30, 1908, was in excess of \$13,525, and on this date a warrant was issued for \$1,725 on Millgrove Township and delivered by appellants to appellees. At this time, not including the amount of the warrant, the indebtedness of the township was more than two per centum on the value of the taxable property within the township. These are allegations of fact and disclose that the township had exceeded at the time the warrant was issued the debt limit fixed by Art. 13 of the Constitution of the State, *supra*. In *State, ex rel. v. John* (1908), 170 Ind. 233, 84 N. E. 1, it was said, "Said advisory board had no power to create or authorize the creation of any indebtedness against said township in excess of the debt limit fixed by Art. 13 of the Constitution of this State."

There is the further allegation that appellees  
2. immediately upon learning of the invalidity of the warrant, tendered the same back to appellants and demanded the amount of money for which it was issued, or a valid warrant. The delivery of the warrant to the appellees by the appellants under the circumstances did not amount to a payment or discharge of the indebtedness. *Cox v. Hayes* (1897), 18 Ind. App. 220, 47 N. E. 844; 30 Cyc 1214; *Pollak Bros. v. Niall-Herlin Co.* (1911), 137 Ga. 23, 72 S. E. 415, 35 L. R. A. (N.



S.) 71; *Godfrey v. Crisler* (1889), 121 Ind. 203, 22 N. E. 999. In *Godfrey v. Crisler, supra*, Mitchell, J., says: "The acceptance from a debtor of forged paper, or paper which the maker had no capacity to execute, in ignorance of the facts, will not discharge a prior liability, even though there be an express agreement to that effect."

There are many other allegations in this paragraph of complaint in reference to appellants' misrepresentations as to the value of the warrant, and the reliance by appellees upon the representations so made; and that appellants knew that appellees were relying upon the statements so made; but, without taking up each of the allegations separately, we are of the opinion that this paragraph of complaint states facts sufficient to withstand a demurrer, and that the trial court did not err in overruling the same.

Judgment is therefore affirmed.

NOTE.—Reported in 108 N. E. 543. As to when acceptance of checks constitutes payment, see 69 Am. St. 346. On the effect of payment by void and worthless paper, see 35 L. R. A. (N. S.) 71. See, also, under (2) 30 Cyc 1193.

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STELLHORN v. BOARD OF COMMISSIONERS OF THE  
COUNTY OF ALLEN.

[No. 8,652. Filed November 3, 1915.]

1. EVIDENCE.—*Judicial Knowledge.—Days and Dates.*—The court judicially knows that neither March 1 nor May 15 fell on Sunday in either of the years from 1905 to 1908, both inclusive, and that the number of days from March 1 to May 15, inclusive, in each of said years, exclusive of Sundays, was sixty-five. p. 18.
2. APPEAL.—*Review.—Evidence.—Presumptions.*—Where plaintiff, suing to recover a balance claimed to be due for services performed on Sundays in the assessment of property for taxation, testified that he had been paid for sixty days' work, while he was in fact paid in full for sixty-five working days intervening from March 1



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to May 15, inclusive, it will be presumed in considering his testimony that he erroneously said sixty instead of sixty-five. p. 19.

3. **SUNDAY.—Statutory Provisions.—“Common Labor”.**—The phrase “common labor” as used in §2364 Burns 1908, Acts 1905 p. 584, §467, prohibiting one from engaging in common labor or in his usual avocation on Sunday, includes the transaction of the ordinary business affairs of life. p. 19.
4. **TAXATION.—Assessment of Property.—Work Performed on Sunday.**—One employed to assess property for taxation, who devoted the Sundays embraced in the period from March 1 to May 15 in checking up and arranging his lists, was on such days engaged in a work incident to the work of assessing and hence engaged in his usual avocation within the meaning of §2364 Burns 1908, Acts 1905 p. 584, §467, prohibiting work on Sunday, and, in view of the fact that the public interests would not have suffered substantially had such work not been performed on Sunday, the work was not one of necessity, nor was it a work of charity, within the exceptions provided by the statute. pp. 20, 21.
5. **EVIDENCE.—Judicial Knowledge.**—The court judicially knows that in each of the years from 1905 to 1908 inclusive, Wayne Township in Allen County had a population of more than 20,000 and not more than 75,000, according to the last preceding United States census. p. 21.
6. **TAXATION.—Assessment of Property.—Work Performed on Sunday.—Compensation.**—One engaged in the assessing of property for taxation can not recover for incidental work performed by him on Sunday in violation of §2364 Burns 1908, Acts 1905 p. 584, §467. p. 22.
7. **TAXATION.—Assessment of Property.—Work Performed on Sunday.—Statutes.**—Although there are seventy-five days including Sundays in the time allotted for the assessment of personal property as fixed by the act of 1903 (Acts 1903 p. 49, §10157 Burns 1908), and that act limited the time for which township assessors might receive pay to seventy-five days, while subsequent amendments provide that assessors should be paid for a time not exceeding such limits as may be fixed by law in any year, it can not be presumed that the legislature intended to authorize township assessors and their deputies to prosecute their work on Sundays, especially in view of §10272 Burns 1908, Acts 1903 p. 49, providing for the assessment of property after the time limited. p. 23.
8. **APPEAL.—Review.—Findings.—Conclusiveness.**—In support of the finding of the trial court, attacked on the ground of insufficient evidence, only the evidence, and inferences therefrom, tending to support the finding can be considered, and the finding thus warranted is conclusive. p. 24.
9. **APPEAL.—Right of Action.—Acceptance of Allowance of Board of Commissioners.**—Where the board of commissioners allowed the claim of an assessor each year for the full number of secular days

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devoted to the work during the period from March 1 to May 15, and disallowed the claim for extra days and work performed on Sundays, and the record discloses that the claim sued on was filed and disallowed in its entirety, the objection that plaintiff, having accepted and retained the allowances for each year, is precluded from maintaining any action for the disallowed portions, is inapplicable. p. 24.

From Allen Circuit Court; *E. O'Rourke*, Judge.

Action by August Stellhorn against the Board of Commissioners of the County of Allen. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

*William Freuchtenicht, Frank J. Belot and Creighton H. Williams*, for appellant.

*Ballou, Hoffman & Romberg*, for appellee.

CALDWELL, J.—Appellant filed with appellee January, 1911, a claim for a balance alleged to be due him for services as a deputy assessor of Wayne Township, Allen County, performed in 1905, 1906, 1907 and 1908. The entire claim as filed was disallowed. On appeal to the circuit court a trial resulted in a general finding and judgment against appellant from which he prosecutes this appeal. The claim is in part as follows:

“Ft. Wayne, Ind., Jan. 24, 1911.

Allen County, Indiana, To August Stellhorn for services rendered said township, as assessor of the personal property of said township for the following periods and days, and for which full compensation has not been rendered, to wit:

1915.

May 15, to 75 days for assessing at	
\$2.00 per day.....	\$150.00
May 16-17, in office checking up at	
\$2.00 per day.....	4.00

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May 18 to 23, inclusive, for abstract  
of field books in office, at \$2.00  
per day..... \$10.00

Total.....\$164.00  
Credit by cash..... 130.00

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\$34.00'

There is a like bill of particulars for each of the years 1906, 1907 and 1908. The total amount of the claim alleged to be due and unpaid is \$136. The sufficiency of the evidence to sustain the decision is the sole question presented.

It is admitted that appellant was a deputy assessor of said township for said years. Appellant was the only witness introduced in his behalf. As far as material to the questions involved, his testimony was to the following effect: Mr. Etzold, township assessor for said years, deceased before the trial, appointed appellant as a field deputy for each of said years. There were also office deputies appointed to do the work in the office. Appellant was appointed to assess personal property within a designated territory. He was not appointed to do office work, but it was a part of his duty when he had completed the work of assessing to check up and arrange in proper order the assessment lists or schedules made out by him and by the property owners under his supervision. He commenced assessing March 1, and completed the work May 15, of each year working every day except Sundays. On each Sunday he checked up and arranged in order the lists made out the previous week. By May 15, of each year he had completed his work of assessing, and on that day delivered the lists at the assessor's office. Thereafter, by direction of the township

assessor, he did certain other work, as checking up and arranging his lists, and making out an abstract of the lists in a small book called the field book. This work was done at his home, in the assessor's office, or at any other convenient place. Appellant as a witness was not entirely clear as to this work. He stated on his direct examination in response to suggestive questions that he worked twelve days at checking and arranging his lists, and two days in preparing his field book each year. On his cross-examination, also in response to suggestive questions, he stated that he worked more than two days at the former and more than five days at the latter work each year. The field book was small, designed to be carried in the pocket, with the pages arranged in columns, wherein were inserted the names, addresses, amounts of property, etc., of persons assessed. Within the period while appellant was assessing, he made up such a book from his lists, and thereafter, pursuant to directions of the township assessor, he copied it and delivered the copy to the assessor's office. Mr. Bushman, township assessor at the time of the trial, was called by appellee as a witness, and testified that the field books described by appellant were not delivered to the county auditor, but were kept for the use of the assessor's office, and were for the use of the assessor the succeeding year, and that it would seriously inconvenience the work of assessing if such books were not kept. In each of said years, appellant was paid, and he accepted the sum of \$130 as credited in his claim.

We know judicially that in neither of said years did either March 1, or May 15, fall on Sunday, and

also that between such dates in each of those

1. years there were eleven Sundays. *Swales v. Grubbs* (1890), 126 Ind. 106, 25 N. E. 877;

*Roberts v. Farmers, etc., Bank* (1894), 136 Ind. 154, 36 N. E. 128; *Western Union Tel. Co. v. Fulling* (1912), 49 Ind. App. 172, 96 N. E. 967. The number of days from March 1 to May 15 inclusive in each of said years, exclusive of Sundays was

2. sixty-five. Appellant as a witness testified that the board of commissioners in each of said years allowed him for sixty days, and refused to allow him for Sunday work and said subsequent work of checking up and preparing the field book, and that his claim in this proceeding is based on the work for which compensation was so disallowed. As appellant was in fact paid for sixty-five days work at two dollars per day, being the wage fixed by statute, in each of said years, he presumably erroneously used sixty for sixty-five in his testimony. It appears, and also is conceded by the parties, that the matter in controversy here includes only such Sunday work and such subsequent work.

A statute in force in the years involved here is in part as follows: "Whoever being over fourteen years of age, is found on the first day of the

3. week, commonly called Sunday, \* \* \* at common labor or engaged in his usual avocation, works of charity and necessity only excepted, shall be fined not less than one nor more than ten dollars." §2364 Burns 1908, Acts 1905 p. 584, §467. The statute contains certain other exceptions not applicable here. The phrase "common labor" as used in the statute includes the transacting of the ordinary business affairs of life. *Bryan v. Watson* (1891), 127 Ind. 42, 26 N. E. 666, 11 L. R. A. 63; *Reynolds v. Stevenson* (1853), 4 Ind. 619; *Quarles v. State* (1891), 55 Ark. 10, 17 S. W. 269, 14 L. R. A. 192, note. The word "avocation" is used in the statute in the sense of vocation or oc-

cupation. *Ross v. State* (1894), 9 Ind. App. 35, 36 N. E. 167. It is thus apparent that appellant in performing work on Sunday as he testified

4. was engaged in common labor as that term is used in the statute. Since for the time being, his occupation was assessing personal property for taxation, and the labor that he performed on Sunday was merely incident to that work, it may be said also that at such times he was engaged in his usual avocation within the meaning of the statute. Appellant, therefore, in laboring on Sunday, violated the statute, unless the work which he performed at such times comes within one of the exceptions designated as "works of charity and necessity". It is plain that he was not engaged in a work of charity. "By the word 'necessity' in the exception, we are not to understand a physical and absolute necessity, but a moral fitness or propriety of the work and labor done, under the circumstances of any particular case, may be deemed necessity within the statute." *Morris v. State* (1869), 31 Ind. 189. It can scarcely be said that the act of working on Sunday, impelled by the mere desire to increase profits or income, creates such a situation of moral fitness or propriety as justifies the performance of such work as a work of necessity. Appellant can not therefore successfully maintain that the fact of the consequent increase in the aggregate of wages makes the involved work one of necessity. Considering the matter from the standpoint of the public, unless public interests would have suffered substantially had the work not been done on Sundays rather than on secular days, or unless the situation required that the work be done, and that it be done on Sunday in order that it might be done at all, the doing of the work on Sundays was not permissible as a work of necessity under the statute.

Appellant urges that the magnitude of the work required of him was so great that it could not have been completed within the time limited by the statute had he not worked on Sundays. It is provided by statute that personal property shall be listed for taxation between March 1 and May 15. §§10157, 10197 Burns 1908, Acts 1903 p. 49. There is a further statutory provision that a failure to complete or return an assessment of property, real and personal, by township assessors within the time required by the taxation laws, shall not vitiate the same, and that if any property is listed or assessed on or after May 15, and before the return of the assessor's books, the same shall be as legal and binding as if assessed before that time. §10272 Burns 1908, Acts 1903 p. 49. The township assessor is authorized to appoint as many deputies to assist him in making the assessment as the extent of the work reasonably requires. §10252 Burns 1908, Acts 1891 p. 199. Moreover, we know

5. judicially that in each of the years in question, Wayne Township in Allen County had a population of more than 20,000 and not more than 75,000, according to the last preceding United States census. *Hawkins v. Thomas* (1892), 3

4. Ind. App. 399, 29 N. E. 157. In such a township the township assessor is required to keep his office open throughout the year for the performance of duties pertaining thereto. §10252 Burns 1908, *supra*. There are other statutes by the terms of which omitted property may be assessed after May 15. §§10270, 10277, 10353 Burns 1908, Acts 1891 p. 199. Appellant, however, within the time limited, completed the work of assessing in the territory assigned to him, without doing any of that sort of work on Sunday. Assuming that the work done by him on Sunday was part of the work of as-



sessing as an incident thereto, it can not be said, under the foregoing statutory provisions that the situation required that it be done on Sunday or that the doing of it at such times may be justified as a work of necessity. No public interest demanded that it be finished at all events by May 15. As we have shown there was statutory authority for completing it after that date. It is desirable, however, and the policy of the law is that the work be completed within the time fixed. If while about the work, it becomes apparent or even probable that a deputy can not complete the work assigned to him within such time, additional deputies may be appointed. We hold that the doing of the work on Sundays can not be justified as a work of necessity within the meaning of the statute. For a general discussion of the principles involved, see the following: *Wilkinson v. State* (1877), 59 Ind. 416, 26 Am. Rep. 84; *Morris v. State, supra*; *Pate v. Wright* (1868), 30 Ind. 476, 95 Am. Dec. 705; *Yonoski v. State* (1881), 79 Ind. 393, 41 Am. Rep. 614; *Quarles v. State* (1891), 14 L. R. A. 192, note; *Bloom v. Richards* (1853), 2 Ohio St. 387. Appellant having violated the statute by laboring on Sunday can not be permitted

6. to recover therefor. *Perkins v. Jones* (1866), 26 Ind. 499; *Pate v. Wright, supra*; *Rogers v. Western Union Tel. Co* (1881), 78 Ind. 169, 41 Am. Rep. 558; *Western Union Tel. Co. v. Henley* (1899), 23 Ind. App. 14, 54 N. E. 775; *Youngblood v. Birmingham Trust, etc., Co.* (1891), 95 Ala. 521, 12 South. 579, 36 Am. St. 245, 20 L. R. A. 58; *Gibbs v. Consolidated Gas Co.* (1889), 130 U. S. 396, 9 Sup. Ct. 553, 32 L. Ed. 979; 6 R. C. L. 699, *et seq.*

Under the taxation statutes enacted in 1891, personal property was required to be listed between



April 1 and June 1. That act provided that 7. township assessors should receive two dollars per day for the time actually employed not exceeding sixty days in any year, and that deputy assessors should receive a like sum per day for the time actually employed. Acts 1891 p. 199, §8418 Burns 1901. The sixty-day provision was continued in the amendment of §92 in 1893. Acts 1893 p. 299, §8510 Burns 1901. The amendment of 1903 required that property be assessed between March 1 and May 15. Acts 1903 p. 49, §10157 Burns 1908. That act limited the time for which township assessors might receive pay to seventy-five days, rather than sixty days. There was a subsequent amendment at the legislative session of 1903, omitting the seventy-five day provision, and providing that township assessors should be paid for a time, "not exceeding such limits as may be fixed by law in any year". Acts 1903 p. 344, §10253 Burns 1908. Such subsequent provision has been continued in recent amendments. §§10253, 10253a Burns 1914, Acts 1909 p. 58, Acts 1913 p. 711. From the fact that there are sixty days including Sundays between April 1 and June 1, and seventy-five days between March 1 and May 15, including the last day and also Sundays, appellant constructs an argument based on the cited legislation, that the legislature must have intended to authorize township assessors and their deputies to prosecute their work on Sundays. We cannot assign to the language used in the cited acts such a forcible meaning, and especially in view of the fact that the substantial part of §10272 Burns 1908, *supra*, providing that property may be assessed after the time limited, and before the assessor has returned his books, has been in force since 1891. Acts 1891 p. 242, §8527 Burns 1901.

The trial court having heard the evidence found in favor of appellee. In support of such finding, there must be arrayed on this appeal the evidence tending to support it and also inferences reasonably deducible from the evidence with a like tendency. Other conflicting inferences must be ignored. Considering the evidence, including the fact that there was long delay in filing and prosecuting this claim, although, as indicated and as admitted by appellant, payment was made to him in full for the days on which he was engaged in the work of actual assessing, and the inferences that the court might draw therefrom, we cannot disturb the court's finding respecting the second and third items in the bill of particulars for each year. As to the third item we do not care to base our decision on grounds urged by appellee that the making of the field book is a work not authorized by law, and that consequently there can be no recovery for it. It occurs to us that the making of such book amounts to no more than the mere making of memoranda of information, which if acquired and noted preparatory to the work of assessing might very much expedite and therefore be allowable as a part of such work.

Appellee, assuming that appellant for each of the years involved filed an entire claim including the amount of his charges for the actual work of assessing, and that the board of commissioners allowed on the claim for each year \$130 and disallowed the balance, and that appellant thereupon accepted and retained the allowance for each year constructs an argument based on *Western Construction Co. v. Board, etc.*, (1912), 178 Ind. 684, 98 N. E. 347, that appellant may not now maintain any form of action to recover such disallowed portions, aggregating \$136. Appellee's assumption

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is erroneous. The record here discloses that the claim involved in this action as filed was disallowed in its entirety. The principle announced by the cited case is therefore not applicable here, and our decision is based on other grounds, as indicated. Judgment affirmed.

NOTE.—Reported in 110 N. E. 89. As to work which may be done on Sunday, see 30 Am. St. 27. What constitutes "labor" or "labor or work" within prohibition of Sunday law, see Ann. Cas. 1913 D 797. See, also, under (1) 16 Cyc 856; (2) 3 Cyc 308, 310; (3) 37 Cyc 544, 545; (4) 37 Cyc 552; (5) 16 Cyc 870; (6) 37 Cyc 569; (8) 3 Cyc 360.

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DONLON v. MALEY ET AL.

[No. 8,772. Filed November 3, 1915.]

1. GUARDIAN AND WARD.—*Duty of Guardian*.—Where a guardian purchased the real estate of her wards at an administrator's sale to pay the debts of their father's estate, any advance in the value of such realty inured to the benefit of the wards, and, though the guardian took the title in her own name, she held what she acquired in trust for them, subject only to her right to be reimbursed for what she had invested. pp. 27, 29.
2. LIMITATION OF ACTIONS.—*Guardian and Ward*.—*Breach of Trust*.—In an action to enforce a constructive trust as to property purchased by the guardian of plaintiffs at a sale held by the administrator of the estate of plaintiffs' father, the claims of plaintiffs were not barred by the six-year statute of limitation, and could only be barred by the fifteen-year statute. p. 29.
3. LIMITATION OF ACTIONS.—*Disaffirmance of Trust*.—The filing of a final report by a guardian did not start the statute of limitations to running against the wards in so far as it operated as a disaffirmance of the constructive trust which arose out of the guardian's purchase of the wards' property at an administrator's sale to pay the debts of their father's estate, where it appeared that thereafter the guardian advanced money to such wards and represented to them that it was obtained from the income of the property, and that she would make a final accounting at a later date. p. 29.
4. MORTGAGES.—*Deed as Mortgage*.—A deed absolute on its face may always be shown to be a mortgage, if it appears by the contract of the parties that it was in fact a mortgage, and for this purpose it is not necessary to aver that any fraud or misrepresentation was used. p. 30.
5. NEW TRIAL.—*New Trial as of Right*.—A new trial as of right

could not be had where the action made out by the complaint was one to enforce a trust and obtain an accounting, and in which the title to land was but incidentally involved, notwithstanding a new trial as of right might have been had as to the cause stated in the first paragraph had it stood alone. p. 30.

6. **APPEAL.—Presenting Questions for Review.—Motion for New Trial.—Grounds.**—Separate objections to each special finding of fact on the ground that the same was not sustained by sufficient evidence and was contrary to law, set out in the motion as grounds for a new trial, though usually and properly to be assigned under the statutory forms that “the decision of the court is not sustained by sufficient evidence” and that “the decision of the court is contrary to law”, sufficiently complied with the statute so as to present the questions sought to be presented. p. 30.
7. **GUARDIAN AND WARD.—Right to Compensation.—Denial of Trust.**—Where a guardian, after acquiring property under circumstances giving rise to a constructive trust in favor of the wards, recognized the right of the wards in the property, was solicitous of the welfare of the wards, and during a long period of time never denied the trust or that an accounting was due from her, but thereafter asserted title and ownership of the property in herself, she could not, when judgment was rendered against her in a suit to declare the trust and for an accounting, claim any compensation for herself or for her attorney for services in management rendered after the time she repudiated the trust, though she was properly allowed for such services prior to such repudiation. pp. 31, 33.
8. **EVIDENCE.—Presumption of Knowledge of Law.**—A litigant is presumed to know the full import of all pleadings filed in his behalf and the legal force to be given to his conduct as shown thereby. p. 33.

From Marion Circuit Court (20,678); *Charles Remster*, Judge.

Action by Anna Maley and others against Ellen Donlon to declare a trust and for an accounting. From the judgment rendered, the defendant appeals. *Affirmed.*

*Walker & Hollett*, for appellant.

*C. S. & G. L. Denny, Smith, Hornbrook & Smith* and *Henry Douglass Pierce, Jr.*, for appellees.

**IBACH, P. J.** — This was an action originally brought by certain heirs at law of James Maley, deceased, against appellant, their guardian, to have a trust declared and for an accounting. Two of the

heirs, Mary and James, who had not joined in the original complaint were subsequently made defendants to the amended complaint. Defendant James filed his cross-complaint in all essential respects similar to the amended complaint, with the additional averment to the effect that a certain quit-claim deed which he had executed to appellant was in fact a mortgage and asking that such deed be treated as a mortgage in the accounting. There were also answers in general denial to the amended complaint, appellant's cross-complaint, and the amended cross-complaint of James. Appellant filed several paragraphs of answer in which she claims payment in full of all sums due and pleads the statute of limitations, and files a cross-complaint to quiet title in her to the lands alleged in the complaint to be embraced in the trust, claiming to be the owner thereof. She also filed a fourth paragraph of answer showing a disbursement of all the funds received by her from all sources as such guardian. There were replies to the several answers. At the request of the parties the court made a special finding of facts with conclusions of law thereon, favorable to appellees. There was judgment for each of the heirs, except Mary, for separate amounts found to be due them, and that the appellant having expended more than her proportionate share of the estate on Mary, was entitled to the interest of said ward in the real estate remaining unsold, and that her title to an undivided one-seventh interest therein be quieted in her.

The amended complaint is very long, setting forth in detail the appointment of appellant as guardian and her transactions in that capacity

1. covering a period of almost fifteen years. No good purpose would be served by setting forth this pleading or the cross-complaint of James

in full. It is sufficient to state that the complaint alleges a purchase of the real estate of appellant's wards at the administrator's sale to pay the debts of their father's estate, for \$7,000, by appellant, and that she took the title in her own name, but declared at the time and different times thereafter, that she made such purchase that the property might not be sacrificed at a forced sale and that she might save what she could for the wards; that she sold two of the pieces of property for \$10,200 and retains title to two other tracts; that a demand for an accounting had been made but such demand had not been complied with; that up to and during the year 1906, appellant furnished appellees money which she represented to them came from the income of the property which she was holding for them, and that she promised to make a settlement when Mary, the youngest child, became of age.

Appellant cites *Chorpenning's Appeal* (1858), 32 Pa. St. 315, 72 Am. Dec. 789, to support her contention that the complaint is insufficient. While this case does in a measure lend some aid to her position, we are not inclined to follow it. It is not a well-considered case and is not in accord with the holdings in this State, nor any other state, as far as our research has gone. We are content to follow the case of *Taylor v. Calvert* (1894), 138 Ind. 67, 77, 37 N. E. 531, and the cases there cited, wherein the doctrine applicable here is thus announced: "From these authorities we may safely deduce the principle of law that whenever a guardian assumes a position in relation to his ward's funds, by which he puts his personal interest in conflict with theirs, or acquires any interest or title adverse to that of his wards, he will not, whether he intended any fraud or not, be permitted to retain the advantage, but the same will inure to the benefit of his wards and he will

hold what he has acquired in trust for them, subject only to his right to be reimbursed for what he has invested." The following cases hold to the same effect: *Fisher's Appeal* (1859), 34 Pa. St. 29; *Potter v. Smith* (1871), 36 Ind. 231; *Schur's Appeal* (1886), 2 Atl. 336; *Talbot v. Provine* (1874), 54 Tenn. 502; *Hayward v. Ellis* (1832), 30 Mass. 272.

Appellant is wrong in her contention that the appellees' claims are barred by the statute of limitations, because the fifteen and not the six-year

2. statute applies. In the case of *Taylor v.*

*Calvert, supra*, where a similar proposition is discussed, the court uses this language on page 82, "This being an action to enforce a constructive trust growing out of a fiduciary relation, the act complained of is poisonous in its consequences and the suit can only be barred by the fifteen-year statute of limitation."

We can not agree with appellant that the final report of appellant referred to in the complaint, started the statute of limitations to running

3. against the wards in so far as it operated as a disaffirmance of the trust growing out of the fiduciary relation occupied by appellant, for it is alleged that as late as 1906, she furnished money to her wards and represented to them that it was obtained from the income of the property, and at that time informed them that she would make a final accounting at a later date fixed by her.

We are satisfied that the averments referred to, together with the remaining allegations of the amended complaint sufficiently set forth facts showing

1. the existence of a trust and an accounting due thereunder and are sufficient to withstand the several objections urged against it. What we have



said with reference to the amended complaint applies with equal force to the amended cross-complaint of defendant James, for he alleges therein that he is likewise a *cestui que trust* under the same trust referred to in the amended complaint, he further avers the same material facts as are found in the amended complaint which show him to be entitled to an accounting. He further discloses the facts connected with the execution by him of a quitclaim deed to appellant and the agreement of the parties

made at that time that such deed be declared in the settlement to be a mortgage.

It is well understood that a deed absolute on its face may always be shown to be a mortgage, if it appears by the contract of the parties that it was in fact a mortgage and for this purpose it is not necessary to aver that any fraud or misrepresentation was used.

Further separate errors are assigned on the refusal of the court to grant a new trial as of right on the amended complaint, and upon appellant's cross-complaint. Clearly appellant is not entitled to this for the reason that the cause of action made out by the amended complaint is one to enforce a trust and obtain an accounting. The title to the land is but incidentally involved. It is doubtless true that if the first paragraph of this pleading stood alone, appellant would have been entitled to a new trial as of right under the statute, but the case proceeded to judgment upon other substantial causes of action as well, and in such cases a new trial as of right will not be granted. *Henry v. Frazier* (1913), 53 Ind. App. 605, 100 N. E. 770, and cases cited. It is contended by appellee that the causes assigned for new trial are not named in the statute and no question is presented thereby.

Appellant assigns numerous reasons in her motion for new trial, and among them separate



objections to each special finding of fact on the ground that the same was not sustained by sufficient evidence and was contrary to law. Appellees insist that these reasons should have been assigned under two assignments, (1) the decision of the court is not sustained by sufficient evidence; (2) the decision of the court is contrary to law. The latter method is, strictly speaking, the method usually followed and prescribed by statute, but it is clear that the method adopted by appellant reaches the same result. We therefore hold that the manner adopted to present the alleged errors is a sufficient compliance with the statute. In a recent case decided by this court the following language is used: "While the assignment here is irregular in form, and not to be commended as a model, taken as a whole we think it refers to a single action of the court, and that there can be no doubt respecting the identity of the ruling intended to be presented for review." *Eckhart v. Marion, etc., Traction Co.* (1915), 59 Ind. App. 217, 109 N. E. 224. See, to the same effect, *Mesker v. Bishop* (1914), 56 Ind. App. 455, 103 N. E. 492, 105 N. E. 644.

Many of the material facts of the case are practically undisputed and the trial court found the facts substantially as they are averred in the

7. amended complaint and the amended cross-complaint of defendant James, including also the findings that appellant was at all times solicitous of the welfare of the appellees, cared for the ward Mary at her own home from infancy and for the others she maintained a separate home, contributed in a large measure toward their support and guided and directed the affairs of such other household. Appellant always recognized that she held the property purchased by her in trust and at various times on request promised to furnish an accounting and

prior to the bringing of this suit she never denied her trust or that an accounting was due from her, but insisted that her wards should wait until the youngest child reached her majority and the property known as the Belmont Avenue property was sold.

The fact is also found and it is admitted by appellees that appellant paid out more money for the wards than was received by her from the estate, but it is found and it is further conceded that she expended on one *cestui que trust* an amount beyond the share actually due her. Accordingly, the court, in its conclusions of law states the several amounts due each of the wards and that the interest of the said Mary in the involved real estate should be the property of appellant by reason of such excess payment to her and quieted the title to the undivided one-seventh interest therein in appellant. The further fact is found that appellant could neither read nor write, that she had to depend on others to keep her records for her and her evidence tends strongly to show that she did not understand the full effect of the pleadings and reports filed by her or that she comprehended that each ward had an equal interest in the estate and no other. She apparently desired to charge the excessive amount paid for Mary's support and education to all the other children. We have no doubt but that appellant thought this could be done, and that she intended to act in good faith in all her transactions with the wards and with the court, and yet in order to obtain the settlement of the estate which the law requires, this action became necessary. However good her intentions may have been toward the appellees, nevertheless her memorandum attached to her demurrer to the amended complaint amounts in law to a denial of the fact that she was a trustee and in her denial to the amended complaint she specifically

denies she was a trustee, and in her subsequent pleadings she asserts that she had paid out for the wards all the money received by her, and in addition pleads the statute of limitation and also filed a cross-complaint asking that a part of the

8. property, alleged in the complaint to be held by her in trust, be quieted in her. She is presumed to know the full import of all such pleadings and the legal force which must be given to her whole conduct. The effect of it all is to deny the trust and to deny that anything was owing to appellees on the accounting.

The rule generally announced in such cases is that when one who comes into the possession of property and it is claimed by others inter-

7. ested therein, that he holds it as trustee for them, and such person in possession denies the existence of a trust and asserts title and ownership of the property, he can not when a judgment is rendered against him claim any compensation for services while he managed the property. *In re Greenfield's Estate* (1854), 24 Pa. St. 232; *Fuller v. Abbe* (1900), 105 Wis. 235, 81 N. W. 401. In this case there was a time when we believe it can be said that appellant recognized that a part of this property, at least, was held by her in trust, and the court properly allowed her for her services and fees for her attorney, but her subsequent conduct was such that it would have been error to have allowed her for later services rendered and for fees earned by her attorneys, under all the facts.

It is the duty of all courts to endeavor to distribute justice to all litigants and we believe this was done by the trial court in this case. It is quite apparent that appellant was at all times solicitous of the welfare of all the appellees, much beyond what is usually

exhibited in such cases, and while it is also apparent that she had sought to deal honestly with her wards, it is difficult to understand why at a later time in the proceedings she claimed title to some of the trust property and by her report claimed that the guardianship fund had been fully and equally distributed. In view of the state of the record we are required to leave appellant where the court below placed her. We have found no reversible error. Judgment affirmed.

NOTE.—Reported in 110 N. E. 92. As to parol evidence to show absolute deeds to be mortgages, see 15 Am. Dec. 47. On limitation of actions to compel guardian to account or for recovery on his bond, see 47 L. R. A. (N. S.) 145. Effect of instrument of defeasance accompanying absolute conveyance of land, see Ann. Cas 1914 C 1079. See, also, under (1) 18 Cyc 769; 21 Cyc 77; (2) 25 Cyc 1058, 1155; (3) 25 Cyc 1169, 1171; (4) 27 Cyc 991; (5) 29 Cyc 1035; (6) 3 C. J. 987; 29 Cyc 951; (7) 21 Cyc 175; (8) 16 Cyc 1083.

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### RICHARDS ET AL. v. RICHARDS.

[No. 9,152. Filed November 3, 1915.]

1. HUSBAND AND WIFE.—*Conveyances.—Estates Granted.—Deed to Husband and Wife.—Statutes.*—Under the provisions of §§3953, 3954 Burns 1914, §§2922, 2923 R. S. 1881, relative to the estates created by conveyances made to two or more persons, a deed of lands to a husband and wife, containing no qualifying words, conveys an estate to them as tenants by the entirety, even though the grantees are not therein described as being husband and wife. p. 38.
2. HUSBAND AND WIFE.—*Conveyances.—Construction.—Deed to Husband and Wife.*—Where a deed of conveyance to a husband and wife contains words which so qualify or define the estate conveyed as to make it apparent that the parties intended the grantees to hold as tenants in common, such intention will prevail and be given effect. p. 38.
3. DEEDS.—*Construction.—Granting and Habendum Clauses.*—A deed is to be construed as a whole and effect is to be given to each and every part if possible, and the intention of the parties as to the kind of estate conveyed, if clearly expressed, will be given effect regardless of the technical rule that the granting clause will prevail over the *habendum* or other parts of the deed tending to curtail or

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modify the estate conveyed, unless there is irreconcilable conflict, in which event the granting clause will prevail. p. 39.

4. HUSBAND AND WIFE.—*Deed to Husband and Wife.—Construction.*—The provisions of a deed of land made to a husband and wife, that if the land was not sold by grantees, then at the death of the husband his half of said land should go equally to all his children, and that if the wife had not sold her part at her death, one-half should be divided equally between her children and her husband's children by his first wife, were not repugnant to the granting clause in the sense that they detracted from or lessened the title conveyed to grantees, but showed an intention that the title was to be taken and held by them in common, and not by the entirety, which must prevail as against the granting clause, though the latter, standing alone, would have conveyed an estate by the entirety. p. 39.

From Delaware Circuit Court; *William A. Thompson*, Special Judge.

Action by Lewis E. Richards and another against Clement E. Richards. From a judgment for defendant, the plaintiffs appeal. *Reversed.*

*Orr & Orr*, for appellants.

*Warner & Warner*, for appellee.

FELT, J.—Appellants brought this suit against appellee to quiet title to certain real estate and for partition. The cause was tried by the court and upon due request a special finding of facts was made and conclusions of law stated thereon, on which judgment was rendered that appellants take nothing and that appellee recover his costs. Both appellants and appellee concede in their briefs that the determination of the controlling question depends upon the construction of the deed, under which both appellants and appellee claim title, a copy of which is set out in the fourth paragraph of answer, and is also embodied in the finding of facts. The deed is in substance as follows:

“This indenture witnesseth, That William A. Roseboom and Almyra Roseboom of Madison County in the State of Indiana convey and warrant to Dan’el Richards and Susana Rich-

ards of Delaware County in the State of Indiana for the sum of \$2841.10 the following real estate \* \* \* (describing it) and if the said Daniel Richards and Susana Richards shall not sell said property during either their natural lives then at the said Daniel Richards' death, his half of said land shall go equally to all his children and if the said Susana has not sold her part at her death, one-half shall be divided equally between her children and her husband's children by his first wife \* \* \*."

The court found that at the date of such conveyance William Roseboom was the owner in fee simple of the real estate conveyed and that he and his wife conveyed the same to the grantees for the consideration of \$2,841.10; that said deed was accepted by the grantees and duly recorded; that at the time of the execution of said deed Daniel Richards had children living by a former marriage, viz., Lewis E. Richards and Addie E. Leach, the appellants, and appellee, Clement E. Richards, and he at no time had any other children; Susana Richards at said date had children living by a former marriage; that at the date of said conveyance, Daniel Richards and Susana Richards, were husband and wife; that in 1905, they sold and conveyed the west fifty-two acres of said real estate and Daniel Richards executed no other conveyance whatever for any part of the land; that he died in 1909, intestate, as to the remaining portion of said real estate estimated to contain 32.47 acres; that he left surviving him his widow and the appellants and appellee, his children, who were his only heirs at law. On May 9, 1912, Susana Richards executed to Clement E. Richards a warranty deed for the 32.47 acres, for and in consideration of love and affection; that said grantee had been in exclusive possession of said real

estate since the date of the last mentioned deed; that Susana died intestate on June 3, 1912.

The court's conclusions of law are in substance as follows: That the deed of conveyance from William Roseboom and wife to Daniel Richards and Susana Richards conveyed to them as tenants by entirety the fee simple title to the real estate; that at the death of Daniel Richards, Susana Richards became the owner in fee of the unsold portion of said real estate amounting to 32.47 acres which is described; that the deed to Clement E. Richards conveyed to him the fee simple title to said real estate and he is still the owner thereof; that appellants take nothing and that appellee recover his costs. Appellants insist that the court erred in holding that the deed "created an estate by entireties in Daniel and Susana Richards", and in ignoring the "limiting and qualifying clause in the Roseboom deed, and in giving to it no place in construing the contract of conveyance." Appellants admit that "If these words shall be held without meaning in their connection, in a proper and reasonable construction of the deed as a whole, then Daniel Richards and wife took the title as tenants by the entirety, and on the death of Daniel, his wife Susana, who survived him, took the whole by the right of survivorship which attaches to such estates. In that view of the case the decision of the trial court is correct and the appeal is without merit." Appellee says: "No cross-errors have been assigned and but one question is before this court, viz., whether or not the Roseboom deed created a tenancy by entirety or a tenancy in common. If the former, as we earnestly contend, then appellee is the owner in fee simple of all the land in controversy; if the latter, then appellants are entitled to partition."

Section 3953 Burns 1914, §2922 R. S. 1881, pro-



vides: "All conveyances and devises of lands, or of any interest therein, made to two or more

1. persons, except as provided in the next following section, shall be construed to create estates in common and not in joint-tenancy, unless it shall be expressed therein that the grantees or devisees shall hold the same in joint-tenancy and to the survivor of them, or if it shall manifestly appear, from the tenor of the instrument, that it was intended to create an estate in joint-tenancy." Section 3954 Burns 1914, §2923 R. S. 1881, provides that: "The preceding section shall not apply \* \* \* to conveyance \* \* \* when made to husband and wife. \* \* \*" The law affecting a conveyance of real estate to husband and wife has been frequently construed by the Supreme Court and the rule is established in this State that in such conveyance, where the deed contains no qualifying words, the grantees take and hold the estate as tenants by entirety. *Simons v. Bollinger* (1900), 154 Ind. 83, 85, 56 N. E. 23, 48 L. R. A. 234; *Brown v. Brown* (1893), 133 Ind. 476, 477, 32 N. E. 1128, 33 N. E. 615; *Hadlock v. Gray* (1886), 104 Ind. 596, 598, 4 N. E. 167; *Carver v. Smith* (1883), 90 Ind. 222, 224, 46 Am. Rep. 210. Where the relation of husband and wife exists, they need not be so described in the deed, in order to create such estate. *Thornburg v. Wiggins* (1893), 135 Ind. 178, 182, 34 N. E. 999, 41 Am. St. 422, 22 L. R. A. 42; *Chandler v. Cheney* (1871), 37 Ind. 391; *Hulett v. Inlow* (1877), 57 Ind. 412, 26 Am. Rep. 64. Where,

however, there are words in the deed which so

2. qualify or define the estate conveyed, as to make it apparent that the parties intended the grantees to hold as tenants in common, such intention will prevail and must be given effect. *Hadlock v. Gray, supra*; *Brown v. Brown, supra*; *Thornburg*



v. *Wiggins*, *supra*, 185; *Dodds v. Winslow* (1901), 26 Ind. App. 652, 654, 60 N. E. 458; *Edwards v. Beall* (1881), 75 Ind. 401, 408; *Prior v. Quackenbush* (1868), 29 Ind. 475, 478; *Wilkins v. Young* (1895), 144 Ind. 1, 5, 41 N. E. 68, 590, 55 Am. St. 162; *Simons v. Bollinger*, *supra*; 1 Washburn, Real Prop. (5th ed.) 674. A deed is to be construed as a whole and effect is to be given to each and every part if possible. Where the intention of the parties

3. as to the kind of estate conveyed is clearly expressed, such intention will be given effect, regardless of the technical rule that the granting clause will prevail over other portions of the deed which tend to modify or curtail the estate conveyed. But where there is irreconcilable conflict between the granting clause and the *habendum* or other portions of the deed, and the intention is thereby rendered doubtful, the granting clause will prevail over other parts of the deed. *Adams v. Merrill* (1910), 45 Ind. App. 315, 319, 328, 85 N. E. 114, 87 N. E. 36; *Doren v. Gillum* (1894), 136 Ind. 134, 138, 35 N. E. 1101; *Edwards v. Beall*, *supra*; *Wilkins v. Young*, *supra*; *Case v. Owen* (1894) 139 Ind. 22, 24, 38 N. E. 395, 47 Am. St. 253; 1 Jones, Conveyancing §568; *Hopkins v. Hopkins* (1908), 114 S. W. 673; *Dickson v. Van Hoose* (1908), 157 Ala. 459, 47 South, 718, 19 L. R. A. (N. S.) 719; 8 R. C. L. 1043 §§98-101.

Appellee insists that the *habendum* or qualifying clause in the deed in controversy is repugnant and contrary to the premises and is void as

4. an attempted limitation over of a fee after a fee granted; that an absolute power of disposition and a limitation over are inconsistent with each other; that the intention of the parties, when ascertained, will be given effect, but if such intention is found to be in conflict with any well-estab-

lished rule of law it cannot prevail. The legal propositions above stated are not controverted, but the contention arises over the meaning and effect of the language of the deed and the law applicable thereto.

The granting clause is in the usual form and standing alone and unqualified would have conveyed to the grantees an estate by entirety. The subsequent provisions are not repugnant to the granting clause in the sense that they detract from, or lessen, the title conveyed to the grantees for they clearly recognize title in the grantees. *Mulvane v. Rude* (1896), 146 Ind. 476, 482, 45 N. E. 659. But this may be true and yet the language may be sufficient to evince an intention to convey and hold the title as tenants in common and not as tenants by entirety. The question relates to the description and nature of the estate held by the grantees without disputing the absolute character of such estate. If the language clearly shows an intention to take and hold the title as tenants in common, then such intention must be given effect. If the intention is clear it is not to be rejected because it is not expressed in the most approved form of legal expression.

It is provided that if the property was not sold by the grantees "then at the said Daniel Richard's death, his half of said land shall go equally to all his children and if the said Susana has not sold her part at her death, one-half shall be divided equally between her children and her husband's children by his first wife." This language shows that the parties intended to hold the property in separate equal moieties, which they understood would descend to their respective legal heirs at their death. The fact that the provision is in a sense testamentary in character does not prevent its consideration in determining the intention of the parties, and we are not

now concerned with its legal effect except in ascertaining the intent of the parties as to the character of the estate conveyed. All the language is to be considered in determining such intent regardless of its ultimate legal effect. Construing all parts of the deed it shows the parties intended the grantees to take and hold the title as tenants in common, and not as tenants by entirety. Gray, Rule Against Perpetuities §§629-632; *Ridgeway v. Lanphear* (1885), 99 Ind. 251, 257; *Garrison v. Day* (1905), 36 Ind. App. 543, 548, 76 N. E. 188. From this it follows that the court erred in its conclusions of law and that the judgment must be reversed. However, owing to the state of the record, the court is of the opinion that the ends of justice will be best subserved by granting a new trial. *Childress v. Lake Erie, etc., R. Co.* (1914), 182 Ind. 251, 259, 105 N. E. 467; *Inland Steel Co. v. Kiessling* (1910), 174 Ind. 630, 634, 91 N. E. 1084. The judgment is reversed with instructions to the lower court to grant a new trial and for further proceedings not inconsistent with this opinion.

NOTE.—Reported in 110 N. E. 103. On the creation of entirety estates, see 30 L. R. A. 320; 33 L. R. A. (N. S.) 166. Sufficiency of deed to create tenancy by entirety, see Ann. Cas. 1912 C 927. See, also, under (1) 21 Cyc 1195; (2) 21 Cyc 1198; (3) 13 Cyc 604, 605, 618; (4) 13 Cyc 619.

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### PETERSON v. LIDDINGTON.

[No. 8,623. Filed May 25, 1915. Rehearing denied November 4, 1915.]

1. APPEAL.—*Review.—Evidence.—Natural Laws.*—Appellant's contention that the decision could not be sustained because it is against natural law that a man 67 years of age, weighing 175 pounds, would be physically able to throw a man 64 years of age and weighing 165 pounds, seven feet, could not be sustained even if the evidence disclosed such state of facts, and especially not in view of the versions of the transaction as disclosed by the record. p. 43.

2. APPEAL.—*Review.—Presumptions.—Burden to Show Error.*—On appeal every presumption is indulged in favor of the correctness of the judgment of the trial court and the burden is on appellant to show prejudicial error. p. 43.
3. APPEAL.—*Review.—Instructions.*—Where the instructions are not in the record by bill of exceptions, and there is nothing to show that they were filed as required by the statute to authorize the bringing of same into the record by other methods, no question can be considered from the standpoint of such instructions. p. 44.
4. ASSAULT AND BATTERY.—*Damages.—Excessive Damages.*—A verdict for \$3,000 damages for an assault and battery on plaintiff, who was at the time an able-bodied man 64 years of age, with an earning capacity of \$4 to \$6 per day, was not such as to enable the court to reverse on the ground of excessive damages, where it appeared that plaintiff's leg was broken, and the extent and character of his other injuries were controverted questions under the evidence. p. 44.

From Lake Superior Court; *Johannes Kopelke*, Judge.

Action by William Liddington against John Peterson. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

*McMahon & Conroy*, for appellant.

*McAleer Bros. and McGirr & Ross*, for appellee.

FELT, J.—This is an appeal from a judgment for \$3,000 obtained by appellee against appellant as damages for assault and battery. The gist of the complaint is that appellant violently struck, beat and wounded appellee, and also wilfully and violently threw him from a house and down upon a pile of rubbish thereby injuring his head, face, back, arms and neck and breaking his leg. The complaint also contains averments showing pain and suffering and expenses incurred as hospital bills and for medical care and treatment, loss of time and wages and permanent injuries for which damages are asked in the sum of \$5,000. The complaint was answered by general denial and by a paragraph of affirmative answer, the gist of which is that the injuries of appellee, if any, were caused by himself

while he was a trespasser on the property of appellant and in the act of leaving the premises in obedience to appellant's order.

The error assigned and relied on for reversal of the judgment is the overruling of appellant's motion for a new trial. The alleged reasons for a new trial not expressly or impliedly waived are (1) that the verdict is contrary to law, (2) excessive damages and (3) error in the giving of certain instructions.

The first contention can not be sustained as the only reason given in support thereof is that "The

record shows an impossible state of facts,  
1. against natural law, that a man 67 years of age, weighing 175 pounds would be physically able to throw a man 64 years of age and weighing 165 pounds, seven feet." We could not sanction the above proposition if all the evidence agreed with the foregoing statement but the different versions of the transactions do not all accord with the statement, but show conclusively that the contention can not be sustained.

The propositions and arguments advanced to show that the damages are excessive seem to be in the main, if not altogether, based on the instructions given the jury. Appellant says: "In view of the instructions given by the court, the jury was misled as to the measure of damages, indicating that the jury acted from prejudice and partiality by being misled as to the measure of damages. \* \* \* We are firm in the opinion that if the court had given instructions that conform to the well-recognized legal principles governing the subject of damages, the jury would not have been misled." When an appeal is taken, every presump-

tion is indulged in favor of the correctness of  
2. the judgment of the trial court. The burden is on the appellant to show error in the judg-

ment from which the appeal is taken. This court will not search the record to reverse but will do so to affirm the judgment of the trial court. *Webster v. Bligh* (1912), 50 Ind. App. 56, 98 N. E. 73. The instructions in the case at bar were not brought

3. into the record by bill of exceptions. Where the instructions are attempted to be brought into the record by the other authorized methods, they are identified by the filing required by the statute and, in the absence of a record showing such filing, they can not be considered. Neither the record nor the briefs show that the instructions in the case at bar were filed as required by our code. Subd. 6 §558, §§560, 561 Burns 1914, §§533, 535 R. S. 1881, Acts 1907 p. 652; *Indianapolis, etc., R. Co. v. Ragan* (1909), 171 Ind. 569, 571, 86 N. E. 966; *Thieme & Wagner Brew. Co. v. Kessler* (1911), 47 Ind. App. 284, 286, 94 N. E. 338. We can not therefore consider the question from the standpoint of the instructions.

Some of the language employed by appellant seems to indicate an intention to present the question of excessive damages independent of the in-

4. structions. There was evidence tending to show that appellee was a strong and able-bodied man 64 years of age, by occupation a painter capable of earning from \$4 to \$6 per day. By the American Experience Tables this would give him an expectancy of life of 11.68 years. It was not disputed that his leg was broken. The extent and character of his other injuries were controverted questions under the evidence. The amount of the judgment is not such as to enable this court to say that the jury acted through prejudice, passion, partiality or corruption. On the showing made, we can not reverse the judgment on the ground that the damages are excessive. *Cleveland, etc., R. Co. v.*

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*Jones* (1912), 51 Ind. App. 245, 251, 99 N. E. 503; *Chicago, etc., R. Co. v. Roth* (1915), 59 Ind. App. 161, 107 N. E. 689, 108 N. E. 971. No reversible error is presented. Judgment affirmed.

NOTE.—Reported in 108 N. E. 977. As to scope and effect of writs of error, see 91 Am. Dec. 193. On excessiveness of verdicts in actions for personal injuries other than death, see L. R. A. 1915 F 491. See, also, under (2) 3 Cyc 275; (3) 3 Cyc 170; (4) 5 C. J. 709; 3 Cyc 1109.

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POTTLITZER ET AL. v. CITIZENS TRUST COMPANY,  
RECEIVER, ET AL.

[No. 8,521. Filed March 5, 1915. Rehearing denied June 22, 1915.  
Transfer denied November 5, 1915.]

1. JUDGES.—*Special Judges.—Appointment.*—The record relating to the appointment of a special judge showing that the regular judge, being interested in the cause, by agreement of the parties appointed such special judge, who took the oath of office and assumed jurisdiction, affirmatively discloses that such special judge obtained jurisdiction of the cause in the manner provided by §427 Burns 1914, Acts 1907 p. 108. p. 59.
2. JUDGES.—*Special Judges.—Appointment.—Waiver of Objections.*—As a general rule all objections to the appointment of a special judge are waived if not made at the time of the appointment, except where the complaining party was not brought into the case until after the action is taken, but in such event the objection of such party is not available unless made upon his first appearance. p. 59.
3. APPEAL.—*Questions Presented.—Motion for Change of Venue.*—No question was presented on alleged error in overruling a motion for change of venue, where, aside from a copy of the assignment of errors, no mention of such error was found in appellants' brief, and no motion for change of venue or ruling thereon was disclosed by the record. p. 60.
4. RECEIVERS.—*Objections to Order for Distribution.—Review.*—Alleged error directed to the action of the court in sustaining a receiver's petition for distribution is not presented by the overruling of a petition to set aside the order of distribution filed long after the distribution had been made and approved, there having been no objection and exception to the ruling on the receiver's petition. pp. 60, 62.
5. RECEIVERS.—*Report.—Order for Distribution.*—Where a receiver reported on every claim filed and showed that he had a balance of cash on hand, and that in his opinion a dividend of sixty-five per



cent could be properly declared, such report, in the absence of any exceptions filed thereto, warranted the court in granting an order of distribution thereon. p. 61.

6. APPEAL.—*Review.—Questions of Fact.*—Alleged error in the overruling of appellants' motions to set aside the order of distribution made in a receivership matter can not work a reversal, where the record discloses that such motions were met by the receiver's verified answer and that evidence was heard, on which the court found that the answer was true, and that appellants had at no time filed their claim with the court or receiver. p. 61.
7. APPEAL.—*Parties.—Record.—Right to Allege Error.*—The overruling of motions to set aside an order of distribution in a receivership case, made by persons affirmatively shown to have been strangers to the record is not available on appeal. p. 62.
8. APPEAL.—*Assignment of Errors.—Conflict With Record.*—No question is presented by the assignment that the court erred in refusing to hear and consider the intervening petitions of appellants, where the record does not show such a refusal, but shows that no such petitions had been properly filed in the court. p. 62.
9. JUDGES.—*Special Judge.—Authority.—Jurisdiction of Regular Judge.*—Where a special judge was regularly appointed and qualified and assumed jurisdiction in a receivership case, he acquired full authority over the case throughout all its stages to the exclusion of that of the regular judge, and, in the absence of a showing that the special judge was incapacitated or refused to act, the regular judge was without authority to receive a petition to intervene in the case. (*Hadley v. Lake Erie, etc., R. Co.* [1899], 21 Ind. App. 675; and *Chicago, etc., R. Co. v. Cunningham* [1904], 33 Ind. App. 145, distinguished.) p. 63.
10. RECEIVERS.—*Intervention by Creditors.—Discretion of Court.*—Creditors desiring to intervene in receivership proceedings must do so under §273 Burns 1914, §272 R. S. 1881, by first procuring leave of court, and the application or motion for such leave calls for the exercise of judicial discretion and must be presented to the judge lawfully presiding in the receivership proceeding. pp. 65, 66.
11. RECEIVERS.—*Dividends.—Duty of Creditors.*—To entitle a creditor to a dividend in a receivership proceeding, it is not enough that the receiver be put upon inquiry as to the claim, but such creditor must file proof in itself satisfactory. p. 66.
12. RECEIVERS.—*Nature and Effect of Proceedings.*—A receivership proceeding is not purely *in rem*, and neither the acts of the receiver nor the orders of the court are binding on persons not parties to the proceeding, nor will the appointment of a receiver generally affect or divest an existing lien. p. 66.
13. RECEIVERS.—*Rights of Creditors.—Intervention.—Laches.*—Where it appeared that a creditor had notice of the time fixed by the court for the filing of claims in a receivership proceeding, and through her attorney informed the receiver that her claim would



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not be filed, the action of the court in disallowing her petition to intervene and have her claim allowed, presented more than two years after the receiver was appointed and more than a year after the time fixed for filing claims and after distribution was made, was not an abuse of the discretion vested in the court in such matters. p. 67.

14. APPEAL.—*Jurisdiction.*—*Appeal from Interlocutory Orders.*—Jurisdiction of an appeal from an interlocutory order is in the Supreme Court only. p. 68.

From Superior Court of Allen County; *John Morris*, Special Judge.

Action by Samuel S. Messing against the Fort Wayne National Furniture Company for the appointment of a receiver, in which, subsequent to the distribution made by the receiver therein appointed, Hannah Pottlitzer and others sought to file intervening petitions. From the judgment rendered, the petitioners appeal. *Affirmed.*

*M. S. Meyberg* and *Robert B. Dreibelbiss*, for appellants.

*Benj. F. Heaton*, *Frank S. Roby*, *Elias D. Salisbury*, *Ward H. Watson* and *Sol. H. Esarey*, for appellees.

HOTTEL, C. J.—The questions which appellants attempt to present by this appeal relate to certain rulings made by the trial court in a suit brought January 10, 1910, by Samuel S. Messing, as a stockholder, against the Fort Wayne National Furniture Company, hereinafter referred to as the furniture company, for the appointment of a receiver, to which suit appellants were not made parties. It will be necessary to an intelligent presentation of such questions to indicate the various steps taken in said suit. The furniture company, by its attorney, *Mitchel S. Meyberg*, and its president, *Abraham L. Messing*, appeared to such suit and admitted that notice thereof had been served on it and that the averments in the application were

true. The cause was submitted to the court for trial, with the result that the Fidelity Trust Company of Indianapolis was appointed receiver and duly accepted and qualified as such. On January 18, 1910, the trust company filed its petition to continue the business of the corporation until such time as its property could be fully and finally disposed of, and the court having heard the evidence on the petition, made an order containing the following provision: "*It is therefore ordered by the court \* \* \* that said property shall be sold free from liens of every character, and that all liens and claims whatsoever shall be transferred to the fund received from the sale of said merchandise, and the collection of the outstanding accounts \* \* \* . That the receiver is ordered to notify all creditors of the \* \* \* furniture company to file their claims with him on or before the first day of March, 1910.*" (Our italics throughout.) On May 3, 1910, the trust company filed its report and resignation as receiver. The court found the report correct, made allowances for the receiver and its attorney, Mitchel S. Meyberg, and accepted such resignation. The parties agreed to and requested the court to appoint the Citizens Trust Company of Fort Wayne as receiver, to succeed the Fidelity Trust Company. The regular judge disqualified himself and appointed Samuel L. Morris as special judge in such cause. On the same day the special judge duly qualified and assumed jurisdiction of the cause and appointed the Citizens Trust Company, hereinafter referred to as appellee, as receiver, and it accepted the appointment. On May 31, 1910, the Fidelity Trust Company filed the receipt of appellee for the property of the furniture company and it was thereupon finally discharged as such receiver. On the same day the Hamilton National

Bank of Fort Wayne, hereinafter referred to as the bank, filed its claim with the court alleging that the furniture company was indebted to it in the sum of \$6,088.90, evidenced by five promissory notes, past due and unpaid; that as collateral security for said loan it had received from the furniture company twelve bonds of \$500 each, a part of forty bonds to be issued and secured without priority or preference by a mortgage on the personal property of such company, which mortgage is a first lien on all the property now owned or held by the receiver. This claim also disclosed that thirty-three of such bonds were issued and that the appellants were the holders of the bonds not held by the bank, as collateral. The bank asked that an accounting be had as to the amount due, and also asked for a foreclosure of the collateral security, and, in the event the property be sold free from liens, that the amount of its indebtedness be declared a first lien on the proceeds.

On June 22, 1910, Samuel L. Morris refused to act further as special judge and resigned. By agreement of the parties, the regular judge appointed John Morris as special judge in said cause and he qualified as such and assumed jurisdiction. On the same day the receiver filed an answer to the bank's claim. The claim was then submitted to the court and it found that there was due the bank, \$6,241.15; that the bank held as collateral security for the payment of said sum, twelve bonds of par value of \$500, each; that in addition to the bonds so held by said bank there were outstanding twenty-one additional bonds of \$500, each, all of which were of the same issue; that "*all of said bonds which were lawfully issued*" were by the furniture company secured by chattel mortgage or trust deed upon all

the assets of such company then in the possession of the receiver; "*that each of said bonds which may have been lawfully issued is an equal and first lien, excepting taxes and costs of administration of this estate,*" on all assets in the hands of the receiver, and entitled to share *pro rata* in the distribution.

On July 11, 1910, the court rendered judgment for the bank for that amount and adjudged and decreed that it lawfully held the twelve bonds as collateral to secure the payment of such sum, the payment of which bonds was secured by chattel mortgage upon all the assets of the furniture company in the hands of the receiver, "which bonds so held by (the) \* \* \* bank \* \* \* together with twenty-one additional bonds of like amount which are outstanding, and which have been lawfully issued (*no attempt being hereby made to adjudicate the validity of the issuance of said twenty-one additional bonds*) and said deed of trust or chattel mortgage securing the same, constitute and are a first lien on all of the assets of the defendant company." The court further adjudged that the bank, as holder of the twelve bonds, was entitled to receive from the receiver its *pro rata* share, or 36.36 per cent of the money in the custody of the receiver, and the receiver was directed to pay that amount to the bank from the funds in its hands and in like proportion until the bank was paid, but in no event to exceed \$6,241.15, etc.

At the November election, 1910, the Honorable Carl Yapple was elected judge of the Superior Court of Allen County, and shortly thereafter qualified and entered on the duties of his office. Under the entry of the proceedings had in said cause on December 14, 1910, the following appears: "Comes now Josie Harding, Dora Meyberg, Emma Messing, Sarah Stern, Essie Rice, Mayer Messing, Hannah

Pottlitzer and Della Pottlitzer Messing (which parties have been and will hereafter be referred to in this opinion as appellants), and each file intervening petitions herein, which petitions are in these words: "The record here sets out the several petitions and *such proceedings are signed by "Carl Yapple, Judge."*

The petitions are lengthy and are all substantially the same except as to the name of the petitioner and the number of the bond or bonds on which the petitioner bases his claim. Each petitioner sets out a copy of the bond or bonds held by him or her and avers all the facts connected with the issuance of said bonds and the execution of the mortgage or trust deed given to secure them, substantially, as alleged in the bank's petition. The facts alleged in each of such petitions show an indebtedness in favor of the petitioner on account of the bonds held by him or her and that such bond or bonds are a part of the same issue as those held by the bank and are secured by the same mortgage which was a first lien on all the property of the furniture company, and a first lien on all the assets of such company in the hands of the receiver.

On January 9, 1911, the receiver filed a petition for partial allowance for its services and for services of its attorneys which petition was granted and it was further ordered by the court "that said receiver give notice to creditors to file verified claims with the receiver or in court on or before January 30, 1911." On February 16, 1911, the receiver filed an additional inventory and appraisement and also filed proof of publication of notice to creditors to file claims and a current report of receipts and disbursements and a report of claims filed with it, together with its recommendation as to allowance thereof, and prayed for "such order as the court

deems proper relative to the allowance of the claims of the several creditors hereinbefore mentioned and the payment of a dividend thereon." The court, upon this showing ordered the receiver "to pay a dividend of 65 per cent, on the amounts of said claims \* \* \* from money in its hands," as shown by its report.

On March 22, 1911, the following entry appears: "*Samuel M. Messing vs. Fort Wayne National Furniture Company*. Comes now the parties and the order herein of date of December 14, 1910, relating to the filing of the intervening petitions by (here follows the name of each appellant) was made at the request of the clerk of court by the regular judge thereof, said entry was made through inadvertence and by mistake, as the regular judge of this court had no jurisdiction of this cause. Read and signed in open court, Carl Yapple, Judge."

On June 12, 1911, the appellants appeared and filed their petition before the Honorable John Morris, Special Judge, asking that the court's order of distribution of 65 per cent, made February 16, 1911, be rescinded and set aside and that the receiver be directed to hold the funds realized by it from the assets of the furniture company, subject to any judgment or allowance which the appellants may hereafter obtain against the same. In this petition appellants set out substantially the same facts set up in their respective intervening petitions, and they further allege, in substance, that such intervening petitions are still pending in this court undetermined; that it is the purpose and intention of the petitioners to prosecute the same to final judgment, and that they are entitled to priority of payment of said mortgage indebtedness and of the bonds held by them over any of the unsecured and general creditors of such furniture company; that

on February 16, 1911, a large number of general claims held against such company were allowed in this court, and the receiver was ordered to pay sixty-five per cent dividend on each of said claims; that the payment thereof would absorb substantially all of the funds in the hands of the receiver and that no further sums will come into his hands sufficient to pay appellants' claims; that as a result, general creditors will wholly exhaust and dissipate the fund which is bound by the lien of appellants' claims. On July 17, 1911, the receiver filed an answer, supported by affidavit to the petition filed June 12, 1911. The answer shows that appellants, Dora Meyberg, Emma Messing, Sarah Stern, Essie Rice and Josie Harding are each sisters of Abe Messing, president of the furniture company; that Della Pottlitzer Messing is his wife; that Mayer Messing is his father; that Hannah Pottlitzer is his mother-in-law; that appellants have all continuously, since the commencement of this cause, been residents of the State of Indiana; that Abe Messing, in addition to being the president of the furniture company, appeared in this court to the complaint of Samuel Messing in this cause, waived the service of process, admitted the averments of the complaint upon which a receiver was appointed, and was employed by the receiver for many months as manager of the business formerly owned by the company; that during said time he repeatedly visited and communicated with each of the above named persons; that Mayer Messing, Hannah Pottlitzer and Della Messing visited and lived with Abe Messing in the city of Fort Wayne; that Mayer Messing visited the former place of business of the furniture company and there consulted with the representative of the receiver; that Dora Meyberg is the wife of Mitchel S. Meyberg who has continuously since the origin of this



proceeding appeared and acted as attorney for each of the appellants; that a proceeding was instituted in the United States District Court to have the furniture company adjudged a bankrupt, in which proceeding Meyberg appeared as attorney for the company; that, while said matter was pending in the United States District Court, a consultation was had between said Meyberg and the attorney for the petitioning creditors who is now attorney for the receiver, relative to the validity of the bonds held by the appellants, and said Meyberg, as such attorney, made various proposals for the adjustment of the bonds held by the appellants and offered a variety of inducements for the withdrawal of opposition to their allowance and payment, all of which were rejected; that an agreement was finally arrived at, whereby the then receiver resigned and the proceedings were dismissed in the United States District Court; that Meyberg again renewed negotiations with the present receiver and its counsel for some adjustment of the bonds, but the receiver was unwilling to recommend an allowance of any of them, except for a nominal sum to equal the cost of opposing the payment of the same; that in all the negotiations relative to such bonds the receiver notified the holders through said attorney that the payment of said bonds would be "rigidly opposed"; that finally long before this court's order for the payment of a dividend of 65 per cent Meyberg told the receiver that the alleged claim of appellants would not be filed as a claim in this cause; that Meyberg, as attorney for the first receiver, secured the order from the court to notify all creditors to file their respective claims on or before March 1, 1910; that such notice was given; that on said date Meyberg was personally notified, as attorney for appellants, to file their respective claims; that such claims were



never filed; that Meyberg, attorney for appellants, was present in court on May 3, 1910, when the regular judge declined to serve further in this cause, and joined in the agreement and request that the Honorable Samuel L. Morris be appointed as special judge; that Meyberg was also present on June 22, 1910, when the Honorable Samuel L. Morris declined to act further as special judge, and joined in the agreement of the parties that the Honorable John Morris be appointed special judge in this cause; that the Honorable John Morris was appointed and duly qualified as special judge in this cause and has never since relinquished his jurisdiction in this cause; that in the proceedings on June 22, which related to the bond issue, said Meyberg was present and in open court sought to secure from the court "at least an inference" of the validity of the bonds alleged to be held by the appellants, but that the court found only for the bank, whose intervening petition relating to the bonds was then under consideration and said: "No attempt being hereby made to adjudicate the validity of the issuance of said twenty-one additional bonds", which are the bonds alleged to be held by the appellants; that Meyberg knew that the bonds held by the bank had been ordered paid but never demanded of the receiver the payment of either the principal or the interest as it matured on the bonds held by appellants; that no claim has ever been filed with this receiver or its predecessor by either of the appellants; that neither of said parties, prior to the \_\_\_\_\_ day of June, 1911, ever secured or asked for authority of this court to intervene or file their claims in any form; that the intervening petitions alleged by appellants to have been filed in this cause on December 14, 1910, were not filed with the consent, authority or knowledge of the Honor-

able John Morris, the judge known by the appellants and their attorney, Meyberg, to be the presiding judge in this cause; that they were left on the clerk's desk where they remained several weeks and were afterwards inadvertently, and without authority, noted filed on the issue docket by the Honorable Carl Yapple, the regular judge of such court; that said regular judge, prior to his assuming the office of judge, was general counsel for the receiver herein and was daily consulted relative to the conduct of its affairs, which fact was known to certain of the appellants and their attorney, Meyberg; that on January 9, 1911, the court caused another notice to be given to creditors; that such notice was given and it required the filing of verified claims with the receiver, or in this court, on or before January 30, 1911; that the property was ordered sold free from liens of every character.

On December 8, 1911, the appellants by their attorneys filed their joint and several motion that this cause be remanded to the regular judge of this court, to the filing of which motion the receiver objected on the ground that it was too late. On the same day this motion was overruled and appellants jointly and severally excepted to such ruling. The appellants, by their attorney, Meyberg, then filed their joint supplemental motion, and each appellant by said attorney filed a separate supplemental motion to set aside said order for distribution. On the same day the receiver filed his verified report of distribution with vouchers.

On December 13, 1911, being the twenty-sixth judicial day of the November term, 1911, the receiver's report of distribution filed December 8, 1911, was approved by the court. On the same day the record shows the following entry: "And now the motion of the said (here follows the name of each

appellant) filed herein on the 12th day of June, 1911, and said joint supplemental motion by them this day filed herein and said separate supplemental motions this day filed by them herein to set aside the order of distribution heretofore made herein is submitted to the court for hearing on said motions and on the verified showing of said receiver heretofore filed herein, and the court being sufficiently advised in the premises, finds that the facts stated in said verified showing of said receiver are true; that the petition of the said (naming appellants) for an allowance of preferred claims based on certain bonds alleged to be held by them and referred to in said motion was never filed with the receiver herein, or with this court; that the entry of the filing of said petition by the Honorable Carl Yapple, the regular judge of this court on the 14th day of December, 1910, was invalid, as said judge had no jurisdiction of this cause at the time and was disqualified to act as judge by reason of his connection with the receiver herein and because of his having been of counsel for said receiver prior to his election as such judge; that the court does not find or decide anything as to the right of said parties now or hereafter to file with this court their said claims or as to whether when properly filed, said claims should or should not be allowed; that said petitioners should pay the costs of this proceeding. It is therefore considered and adjudged by the court that said motion filed by said (here follows name of each appellant) on the 12th day of June, 1911, be, and the same is hereby overruled, at the cost of said petitioners, to which ruling each of said parties jointly and severally except. It is further considered and adjudged that said joint supplemental motion of said parties this day filed herein, be, and the same is hereby overruled, at their costs, to which ruling

said parties jointly except. It is further considered and adjudged by the court that said separate supplemental motion of said Emma Messing this day filed herein be, and the same is hereby overruled, at her costs, to which ruling said Emma Messing excepts. (Then follows a like judgment as to each separate petitioner.) And said several petitioners jointly and severally pray an appeal to the Supreme Court of Indiana which is granted.”

On February 5, 1912, Emma Messing filed her verified petition to be allowed to intervene and have allowance of claim, which petition on February 16, 1912, was disallowed by the court, to which ruling Emma Messing excepted and asked and was granted sixty days in which to file her bill of exceptions herein.

The appellants jointly assign as error: (1) The court erred in overruling the motion of these appellants to remand this cause to the regular judge of the court. (2) The court erred in overruling the motion for a change of venue from the judge of the court. (3) The court erred in sustaining the petition of the receiver for a distribution to general creditors and ordering the same. (4) The court erred in overruling the petition of these appellants to set aside its order for distribution to general creditors. (5) The court erred in overruling the supplemental motion of these appellants to set aside its order for distribution. (6) The court erred in refusing to consider and hear the intervening petitions of these appellants. (7) The court erred in adjudging that the intervening petitions of these appellants were never filed with the receiver or with the court. A similar separate assignment of error by each appellant was also filed, and Emma Messing in her assignment includes an eighth error as follows: (8) The court erred in disallowing the intervening peti-

tion of Emma Messing asking for the allowance of her claim as a secured debt of the defendant.

It is doubtful whether the first ruling complained of is properly raised by an independent assignment of error. *Citizens St. R. Co. v. Shepherd*

1. (1902), 29 Ind. App. 412, 418, 420, 424, 62

N. E. 300, and cases cited in concurring

opinion; *Brenner v. Heiler* (1910), 46 Ind. App. 335,

91 N. E. 744; *Walb v. Eshelman* (1911), 176 Ind.

253, 260, 94 N. E. 566, and cases cited; *Houser v.*

*Laughlin* (1914), 55 Ind. App. 563, 104 N. E. 309.

Assuming, however, without deciding that such alleged error is properly presented, appellants are in no position to take advantage of it. They were not parties to the action at the time of the appointment of the special judge. The record on the subject of the appointment of special judge is as follows:

"Comes now the parties \* \* \* and the regular judge of this court, Hon. Owen N. Heaton, being interested in this cause, by agreement of the parties the Hon. John Morris is appointed as special judge herein. O. N. Heaton, Judge." The record then sets out the oath of such special judge and shows that he assumed jurisdiction of the cause. It thus affirmatively appears from the record that such special judge obtained jurisdiction of said cause in the manner provided by §427 Burns 1914, Acts 1907 p. 108. It is a general rule that objection to the appointment of a special judge must be

2. made at the time of the appointment or when he assumes jurisdiction, otherwise "all ob-

jections to the regularity of the appointment shall be deemed waived." *Lillie v. Trentman* (1891),

130 Ind. 16, 19, 21, 29 N. E. 405; *Ripley v. Mutual*

*Home, etc., Assn.* (1900), 154 Ind. 155, 156, 56 N. E.

89; *Crawford v. Lawrence* (1900), 154 Ind. 288, 56

N. E. 673; *Walb v. Eshelman, supra*. It seems, how-

ever, that an exception to the general rule obtains where the party complaining of such action was not before the court at the time the action was taken and is afterwards brought into the case. In such a case the new party, upon his first appearance, may object to such appointment and move to remand the cause to the regular judge. *Walb v. Eshelman, supra*; *Houser v. Laughlin, supra*. This exception can be of no avail to the appellants in this case, for the reason that they did not object to such appointment on their first appearance, but instead they first filed a motion to set aside the order of distribution made by such special judge. They thereby waived the regularity of his appointment. *Lillie v. Trentman, supra*; *Lewis v. Albertson* (1899), 23 Ind. App. 147, 154, 53 N. E. 1071. No question is presented by the second error assigned for the reason that,

outside of the copy of the assignment of er-

3. rors set out in appellants' brief no further mention of such assigned error is found in the brief, and no motion for a change of venue or ruling in relation thereto appears in the record. Rule 22, subd. 5; Ewbank's Manual §§137, 138; *Cleland v. Applegate* (1894), 8 Ind. App. 499, 502, 35 N. E. 1108; *Burck v. Davis* (1905), 35 Ind. App. 648, 655, 73 N. E. 192; *Starky v. Starky* (1894), 136 Ind. 349, 351, 36 N. E. 287.

The third assignment of error presents no question for either of two or more reasons: (1) It will

be observed that this assigned error is directed

4. to the ruling of the court in sustaining the receiver's petition for a distribution to general creditors, and in ordering such distribution and not to the ruling on appellant's motion to set aside the order. The record shows that this order was made on February 16, 1911; that on December 8, 1911, the receiver filed its formal report of distribu-

tion with vouchers, and on December 13, 1911, the court approved such report and distribution. Appellants never at any time made any objections to the order of distribution, but on June 12, 1911, filed their petition to set aside the order. "An objection by appellant and an exception taken at the time an erroneous ruling was made are essential as the basis for an appeal." Ewbank's Manual §255; §655 Burns 1914, §625 R. S. 1881. The only exception that appellants have saved affecting this question relates to the court's ruling on their petition and supplemental motion to set aside the order for distribution to creditors, which rulings are attempted to be presented by the fourth and fifth assigned errors and will be hereafter considered. (2)

The receiver reported on every claim filed and

5. showed that he had a balance of cash on hand amounting to \$11,381.35 and "in the opinion of the receiver a dividend of sixty-five per cent could be properly declared." Such report stood as the complaint and, as there were no exceptions filed to it, the facts stated therein were sufficient for the court to grant the order of distribution. *Halsted v. Forest Hill Co.* (1901), 109 Fed. 820; *Johnson v. Central Trust Co.* (1903), 159 Ind. 605, 65 N. E. 1028; *Bossert v. Geis* (1914), 57 Ind. App. 384, 107 N. E. 95.

Appellant's fourth and fifth assigned errors can not work a reversal of the judgment below for the reason that the record shows that the ques-

6. tions presented by the petitions and supplemental motions therein referred to were met by the affirmative verified answer of the receiver hereinbefore set out, and that on such answer the questions presented by such motions and petitions were submitted to the court for hearing and the court found that the facts stated in such verified



answer were true; that the petition of the said Emma Messing *et al.*, naming them, “for an allowance of preferred claims based on certain bonds alleged to be held by them and referred to in said motion were never filed with the receiver herein, or with this court; that the entry of the filing of said petition by the Honorable Carl Yapple, the regular judge of this court on the 14th day of December, 1910, was invalid.” It also affirmatively appears from this

finding that appellants never at any time

7. filed their claims with the court or receiver, and hence were strangers to the record, and in no position to ask a rescision of such order of distribution. Under such circumstances, any ruling on their petitions or motion could avail them nothing in this court. *Jager v. Doherty* (1878), 61 Ind. 528, 534. It might also be remarked in this connection

that this finding shows that appellants were

4. in no position to ask or obtain any benefit from either of the errors before discussed.

Assuming, however, without so deciding, that the finding of the trial court, improperly found that the appellants had never filed their claim, and that the entry made by Carl Yapple, judge, was invalid, their fourth and fifth assigned errors would still be unavailing. If they had in fact filed their claims and were parties to the record, they should have excepted to and appealed from the order of the court for the payment of the money and not from the order overruling their petitions and motions to set aside such order. *Wabash R. Co. v. Dykeman* (1892), 133 Ind. 56, 64, 32 N. E. 823; *Continental Clay, etc., Co. v. Bryson* (1907), 168 Ind. 485, 81 N. E. 210. Ap-

pellants' sixth assigned error presents no

8. question for the reason that the record does not show that the court refused to hear the intervening petitions of appellants. On the con-



trary the record shows in effect that the court found that no such petitions had ever been filed with the proper court.

This brings us to a consideration of the seventh assigned error which challenges the ruling of the court "that the intervening petitions of these 9. appellants were never filed with the receiver or with the court." It is suggested by appellee that this assignment is not directed against any ruling of the trial court disclosed by the record. The language of the finding of the court is that the "petition for an allowance of claims \* \* \* was never filed", etc. In support of this contention appellee cites *Burck v. Davis, supra*; *Starky v. Starky, supra*. See also, *Mesker v. Bishop* (1914), 56 Ind. App. 455, 103 N. E. 492, 105 N. E. 644; *Walter A. Wood, etc. Mfg. Co. v. Angemeier* (1912), 51 Ind. App. 258, 99 N. E. 500. It is also suggested that an appeal does not lie from a finding of the court that an intervening petition was *never filed*; but that the remedy in such case is to ask leave to file such petition. We do not deem it necessary to decide the questions suggested because it affirmatively appears from the answer of the receiver and from the record in its entirety that appellants are in no position to complain of such ruling. It appears that the Honorable John Morris, by agreement of the parties, was appointed and qualified as special judge in said cause and assumed jurisdiction on June 22, 1910; that in December, 1910, the alleged intervening petitions were left on the table of the clerk of such court with no instructions and by him presented to the regular judge and an entry made by such judge showing such filing; that this was without the knowledge, authority or consent of the special judge. The facts relating to the filing of such petitions were set forth in the receiver's showing and were not dis-

puted by either of appellants. When a special judge is regularly appointed and qualifies and assumes jurisdiction in a cause, he acquires full authority over the case throughout all its stages and the authority of the regular judge is necessarily excluded. The particular case in which such appointment is made, with all of its incidents from the beginning to the end, passes under the exclusive control and jurisdiction of the special judge. *Perkins v. Hayward* (1890), 124 Ind. 445, 447, 24 N. E. 1033; *Mayer v. Haggerty* (1894), 138 Ind. 628, 635, 38 N. E. 42; *Lerch v. Emmett* (1873), 44 Ind. 331, 332; *Staser v. Hogan* (1889), 120 Ind. 207, 223, 224, 21 N. E. 911, 22 N. E. 990; *Shugart v. Miles* (1890), 125 Ind. 445, 448, 25 N. E. 551; *Courtney v. State* (1892), 5 Ind. App. 356, 363, 32 N. E. 335.

It is the contention of appellants that the Honorable Carl Yapple, the regular judge, could have received the petition and that it could have been acted upon later by the special judge who was vested with jurisdiction in the case. In support of this contention, appellants cite the cases of *Hadley v. Lake Erie, etc., R. Co.* (1899), 21 Ind. App. 675, 680, 51 N. E. 337; and *Chicago, etc., R. Co. v Cunningham* (1904), 33 Ind. App. 145, 146, 147, 69 N. E. 304. In the latter case, Roby, J., speaking for the court, says: "The regular judge of the Washington Circuit Court was unable to preside at the trial of this cause on the day set therefor because of serious illness in his family, and, by agreement of the parties, a special judge was appointed, who thereafter acted therein. The verdict was returned January 3, 1902. January 18 was the last day of the term, and at that time the special judge was ill and unable to attend. In this action the regular judge resumed jurisdiction for the purpose of making the record show the filing of appellant's motion

for a new trial, which was then filed. The practice so followed was proper. He was not disqualified." In support of this proposition of law, two cases are cited, *Hadley v. Lake Erie, etc., R. Co., supra*, and *Perkins v. Hayward, supra*. The latter case clearly shows the reason for such ruling in the following language: "In our opinion the particular case where there is a special judge called in, with all its incidents from the beginning to the end, passes under the *exclusive control and jurisdiction* of the special judge, subject to revert to the control of the regular judge in the event that the special judge becomes *incapacitated or refuses to act*." (Our italics.) We have indicated enough of the opinion in the case of *Chicago, etc., R. Co. v. Cunningham, supra*, to show that the special judge was incapacitated by illness. There is no such showing in the case at bar, or that such special judge refused to act.

Moreover, the right to file a motion for new trial is given by statute and when filed within the proper time, the right is in no sense dependent on the discretion of the court, while the filing of a petition to intervene invokes the discretionary power of the court and thus furnishes another factor dis-

10. tinguishing the instant case from those relied on by appellant. Creditors desiring to intervene in receivership proceedings do so under §273 Burns 1914, §272 R. S. 1881, which applies "to any controversy in the nature of a civil action," and such creditors must first secure leave of court. *Cambria Iron Co. v. Union Trust Co.* (1900), 154 Ind. 291, 296, 55 N. E. 745, 56 N. E. 665, 48 L. R. A. 41; *Voorhees v. Indianapolis, etc., Mfg. Co.* (1895), 140 Ind. 220, 39 N. E. 738; *Thayer v. Kinder* (1910), 45 Ind. App. 111, 89 N. E. 408, 91 N. E. 323; *State v. Union Nat. Bank* (1896), 145

Ind 537, 44 N. E. 585, 57 Am. St. 209; *Gale v. Shillock* (1886), 4 Dak. 182, 30 N. W. 138; *Zumbro v. Parnin* (1895), 141 Ind. 430, 40 N. E. 1085; 1 Hogate, Pl. and Pr. §118. The application or motion for such leave of court calls for the exercise of judicial discretion and must be presented to the judge lawfully presiding in the receivership proceeding. When so presented such judge must determine "First, whether, conceding it to be a proper case for intervention, her complaint is sufficient in law for such purpose? Second, was her application made in time? Third, had (the intervener) \* \* \* such an interest in the matter in litigation, \* \* \* as would entitle her to become a party by intervention?" *Gale v. Frazier* (1886), 4 Dak. 196. A creditor of an insolvent corporation in order to entitle himself to a dividend must

11. do more than put the receiver upon inquiry as to his claim. He must file proof in itself satisfactory. *Meding v. Todd* (1898), 56 N. J. Eq. 820, 41 Atl. 222; 34 Cyc 343. One having a claim upon the property desiring to partic-
10. ipate in the distribution of the funds under the control of the court through its receiver must intervene in the court of the receivership in the case in which the receiver has been appointed and establish his rights in that tribunal or obtain its leave to bring an independent action. 34 Cyc 217; High, Receivers (4th ed.) §254. Under the conditions as shown by the record, exclusive jurisdiction in said cause rested with the special judge, and such court properly held that appellants' petition "for allowance of preferred claims \* \* \* was never filed with the receiver herein or with this court." In this connection, it
12. may be suggested "that the administration of an estate by a receiver is not purely a pro-

ceeding *in rem*, and that the acts of such receiver, and the orders of the court in which the estate is administered, do not bind persons who are not parties to the proceeding, and who had no opportunity of being heard. \* \* \* The appointment of a receiver will not, as a general rule, affect or divest an existing lien." *J. W. Dann Mfg. Co. v. Parkhurst* (1890), 125 Ind. 317, 320, 321, 25 N. E. 347, and cases cited.

The eighth assigned error seeks to present the action of the court in disallowing the petition of Emma Messing to intervene and have her  
13. claim allowed. As heretofore indicated on January 18, 1910, the court ordered notice given to creditors to file their claims with the receiver by March 1, 1910. On January 11, 1911, another order was made that the receiver give notice to creditors to file verified claims with the receiver or the court by January 30, 1911. The record shows that both notices were given. On February 16, 1911, the claims then filed with the receiver were allowed by the court and a distribution ordered. Said petition to intervene was not filed until February 5, 1912, or more than two years after the receiver was appointed and more than one year after the expiration of the time fixed by the second order for filing claims, and more than a year after the distribution was made. Said petitioner's attorney had knowledge of the various steps taken in said proceeding and according to the receiver's undisputed verified answer, had told the receiver that appellant's claim would not be filed. The petitioner made no attempt to make any showing why she had not complied with the orders of the court for filing her claim, or to explain her conduct, or that of her attorney in reference thereto. An intervener must be diligent, and any unreasonable delay after knowl-

edge of the suit will justify the court in disallowing such intervention, where no satisfactory excuse is shown for the delay. *Halsted v. Forest Hill Co., supra; Smith v. Gale* (1892), 144 U. S. 509, 12 Sup. Ct. 674, 36 L. Ed. 521; *Gale v. Shillock, supra*. Appellant, Emma Messing, here in this court seeks to meet this apparently unwarranted delay by the claim that she ought not to be defeated by laches for the reason that the record shows that she has been before the court claiming recognition all this time. She does not, however, deny that she was notified of the time when her claim should have been filed, nor claim she was refused permission to file her claim prior to the time fixed by the court's orders. Under the facts disclosed, the disallowance of such petition for intervention filed February 5, 1912, was not an abuse of the discretion vested in the lower court in such matters.

It is finally suggested by appellees that the "joint assignment and each of the separate assignments of error of appellants numbered from one to seven, inclusive, are each based upon an interlocutory order made in the progress of the cause; "that the case has not been finally disposed of below; that there has been no attempt on this appeal to comply with the statute governing appeals from interlocutory orders, and that such "assignments therefore, present no question for this court's determination." The suggestion is one that would require consideration, if our disposition of the errors assigned necessitated a reversal of the judgment below, but,

14. in view of the fact that our disposition of such assigned errors must result in an affirmance of the judgment, we deem it unnecessary to discuss or decide the question suggested. It should be said, however, in this connection, that jurisdiction of an appeal from an interlocutory order is in the Supreme

Court and not in this court. In this case, however, there has been no attempt to perfect an appeal from an interlocutory order as provided by statute (§§658, 688, 1391 Burns 1914, §§627, 647 R. S. 1881, Acts 1901 p. 565), and if appellees' suggestion were correct a dismissal of the appeal, at least as to appellants other than Emma Messing, would follow rather than an affirmance of the judgment. There are other irregularities in the appeal but in view of our conclusion as to the merits of the appeal we deem it unnecessary to discuss them. Finding no reversible error, the judgment below is affirmed.

NOTE.—Reported in 108 N. E. 36. As to what judgments and orders may be appealed from, see 20 Am. St. 173. See, also, under (1) 23 Cyc 604, 608; (2) 23 Cyc 616; (3) 3 C. J. 1410; 2 Cyc 1014; 3 Cyc 160; (4) 34 Cyc 374; (5) 34 Cyc 371; (6) 3 Cyc 366; (7) 3 Cyc 239; (8) 3 C. J. 1364; 2 Cyc 1001; (9) 23 Cyc 613; (10) 34 Cyc 217; (11) 34 Cyc 343; (12) 34 Cyc 180; (13) 34 Cyc 342; (14) 3 C. J. 438; 2 Cyc 591.

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WILLIAMS v. WOOD ET AL.

[No. 8,185. Filed May 7, 1915. Rehearing denied October 7, 1915.  
Transfer denied November 5, 1915.]

1. APPEAL.—*Review.—Ruling on Demurrer.*—By demurring to appellees' cross-complaint and to the third, fourth and fifth paragraphs of answer, appellant, for the purposes of the demurrers, admitted the truth of the facts well pleaded in each of such pleadings, so that on the overruling of such demurrers appellant's refusal to plead further necessitated the pronouncing of judgment on the facts pleaded, and, even though the court erred in sustaining the demurrer to the fourth and fifth paragraphs of answer, such judgment must stand, in view of the sufficiency of the cross-complaint and of the third paragraph of answer to withstand the demurrers addressed to them. p. 73.
2. HUSBAND AND WIFE.—*Administrator's Sale of Lands of Deceased Wife.—Jurisdiction.—Rights of Surviving Husband.*—While a circuit court has general jurisdiction to order the sale of lands in proper proceedings, it exceeds its authority in an ordinary case by directing the sale of the lands of a surviving husband to pay the debts of his deceased wife's estate, and such action will not stand as against a direct attack. p. 74.



3. HUSBAND AND WIFE.—*Administrator's Sale of Lands of Deceased Wife.—Rights of Surviving Husband.*—A surviving husband was properly precluded from recovering in an action against persons claiming under an administrator's sale of his wife's lands, brought to quiet title and for possession of one-third of such land, where it appeared that he was a party to the administrator's petition, and properly served and defaulted, that the court ordered the sale of the wife's land as a whole, including his interest therein, for the payment of the wife's debts, including certain mortgages in which he had joined, and that there was nothing in such petition to show that he as such surviving husband in fact became the owner of any part of the lands of which his wife died the owner. p. 74.
4. HUSBAND AND WIFE.—*Lands of Deceased Wife.—Rights of Surviving Husband.*—It does not conclusively follow from the fact that a wife dies intestate the owner in fee of certain real estate, and leaving a husband surviving, that he, as such surviving husband, inherits from her any interest in such land. p. 74.

From Miami Circuit Court; *Joseph N. Tillett*, Judge.

Action by Henry Williams against Edward F. Wood and others. From a judgment for defendants, the plaintiff appeals. *Affirmed.*

*G. E. Ross*, for appellant.

*Cox & Andrews*, for appellees.

CALDWELL, J.—Appellant's complaint is in three paragraphs. In each paragraph he alleges that he is the owner of the one-third part of a certain 60-acre tract of land in Miami County, and that appellees, Edward F. and Sarah (or Sallie) Wood, and William P. and Mary E. Rarey claim to own the remaining two-thirds. By the first paragraph he seeks to recover one-third of the rents and profits of said lands from 1894; by the second paragraph, he seeks to quiet his title to said one-third, and by the third paragraph he prays partition. Before judgment the cause was dismissed as to Rarey and Rarey, leaving as defendants appellees Wood and Wood. Demurrers to appellees' cross-complaint, and third, fourth and fifth paragraphs of answer were over-



ruled, and sustained to the first and second paragraphs. Appellant elected to abide said adverse ruling, and failing to plead further, judgment was rendered that he take nothing by his complaint, and that appellees' title to the whole of said land be quieted, as prayed in the cross-complaint.

Error is assigned on the overruling of the demurrers. The third paragraph of answer and the cross-complaint, each of which is lengthy, are practically identical in averments. In each of them the facts are set out, by virtue of which appellant claims to be the owner of said one-third, and by which appellees claim to be the owners of the whole of the lands. The essential features of said paragraph of answer and said cross-complaint are as follows: That in March, 1893, Eliza Jane Williams died intestate, owning in fee the tract of land, and leaving surviving her, as her only heirs at law, the appellant, her husband, and Leslie Williams and certain other children. There are set out in detail the proceedings by which said lands were sold at an administrator's sale, for the purpose of paying the debts of the estate of said Eliza Jane Williams, said Rarey and Rarey being the purchasers for the sum of \$1,850. The petition, order and report of sale and administrator's deed described said lands as a whole, rather than the undivided two-thirds or any other part thereof. The administrator's petition for an order to sell the lands alleged that Eliza Jane Williams died intestate; that appellant, as her husband, and said children survived her; that she owned the land in fee simple, and that she left no personal estate. The existence of debts against said estate is alleged as follows: "The claims against said estate are, amount due Shirk estate \$1,160; amount due ditch lien \$372; funeral expenses and expenses of last sickness about \$100; taxes due about \$25."

There is no allegation in the petition on the subject of whether any part of said lands descended to appellant on the death of his wife, or whether he owned any interest therein, except the averment that appellant survived said Eliza Jane Williams, as her husband, and there is no specific allegation showing either the right or the necessity of selling any such interest owned by appellant. The prayer of the petition is for an order to sell the lands, alleged to be of the value of \$2,500. Appellant and said children were made parties to said proceeding, and were properly served with notice. Appellant, having made no appearance, was defaulted. By proceedings regular in form, the court entered an order directing the sale of the land specifically described as a whole.

As indicated, it further appears from the paragraph of answer and said cross-complaint that the notice of sale was to the effect that the lands described as a whole, would, at a named day, be offered for sale; that the report of sale was to the effect that the lands described as a whole had been sold to Rarey and Rarey, and that the administrator's deed was to the effect that the administrator by order of court did thereby convey the lands described as a whole, to the purchasers. It is further alleged in each of the pleadings that the entire sum realized from the sale of the land was applied in discharge of the debts of the estate; that included in the debts so paid were two items secured by mortgage on the lands sold; that the first of the mortgages was executed by the decedent and appellant on November 3, 1891, to secure notes in the original sum of \$1,400, executed by decedent to Milton Shirk, executor, for an unpaid balance of the purchase price of the land; that the second of the mortgages was executed by appellant and decedent

to the executor on October 10, 1892, to secure a promissory note executed by decedent for \$350; that in all \$1,591.44 of the selling price was applied in paying the balance due on the mortgage indebtedness; \$24.54 in payment of taxes and gravel road liens against the lands; \$112.42 in payment of expenses of administration, and that the balance was applied on said funeral expenses and expenses of last sickness. It is further alleged that on the execution of said deed, said Rarey and Rarey entered into possession of the whole of the land, and continued in such possession until a subsequent date, when they sold and by deed conveyed the whole of the lands to appellees, who thereupon took and have ever since held the peaceable possession of the lands, by virtue of said deeds, and that all the rents and profits received by appellees from the lands were so received as owners.

Appellant, by demurring to said cross-complaint, and to the third, fourth and fifth paragraphs of answer, admitted the truth of all facts that

1. were well pleaded in each of such pleadings.

Such admission, however, was only for the purposes of the demurrers. Having met with an adverse ruling on each of the demurrers, appellant then elected to abide the ruling of the court, and refused to plead further. It, therefore, became the duty of the court to pronounce judgment on the facts averred. Each of the paragraphs of answer was pleaded in bar of appellant's causes of action, as contained in the three paragraphs of complaint. If it should be true that the facts averred in the fourth and fifth paragraphs of answer are insufficient to defeat appellant's causes of action as pleaded by his complaint, and if it should be held that the court erred in its ruling on the demurrers to such paragraphs of answer, or either of them, still the

facts pleaded by the third paragraph of answer must be reckoned with. If such facts are sufficient to defeat each and all of appellant's causes of action, as pleaded, then the judgment of the court was right, and it becomes immaterial whether the court's rulings on the demurrers to the other paragraphs of answer were correct. A like conclusion is inevitable, if the facts pleaded by said cross-complaint state a cause of action. *Island Coal Co. v. Wright* (1895), 12 Ind. App. 640, 40 N. E. 1114; *Morrison v. Kendall* (1893), 6 Ind. App. 212, 33 N. E. 370; *Keys v. Wright* (1901), 156 Ind. 521, 60 N. E. 309; *State, ex rel. v. Hall* (1909), 173 Ind. 145, 89 N. E. 855. The question of the sufficiency of the third paragraph of answer and of the cross-complaint is, ruled by *Stone v. Elliott* (1914), 182 Ind. 454, 106 N. E. 710, which in effect materially modifies prior decisions of the Supreme Court, and under the authority of such decision, the judgment here must be affirmed.

A circuit court has general jurisdiction to order the sale of lands in proper proceedings. It may be conceded, however, that a court exceeds the

2. limit of its authority when in any ordinary case it directs the sale of the lands of the surviving husband, for the purpose of paying the debts of his deceased wife's estate, and that any such action on the part of the court will not stand as
3. against a direct attack by appeal, proceeding to review, or other like procedure. The attack here, however, is collateral, rather than direct. Moreover, it did not appear in said proceeding that appellant, in fact, as such surviving
4. husband became the owner of any part of the lands of which his wife died the owner, and the court did not so find. From the fact that the wife died intestate, the owner in fee of the lands, leaving

appellant surviving her, as her husband, it does not conclusively follow that he thereby inherited from her any interest in the lands. If such a husband has abandoned his wife, under the circumstances set forth by §§3035, 3036 Burns 1914, §§2497, 2498 R. S. 1881, he takes no part of her estate. Also the husband may waive his rights in his wife's estate by either an antenuptial or a postnuptial agreement, or he may estop himself from asserting such rights, whereby, on the full presentation of all the facts, the court may properly direct a sale of the entire title to the lands of which the wife died the owner, and in such a case, the court's action would stand, even as against a direct attack. *Pearson v. Kepner* (1902), 29 Ind. App. 92, 63 N. E. 38; *Roach v. White* (1884), 94 Ind. 510. In the case at bar, while the petition to sell lands did not disclose such fact, it appears that appellant had joined his wife in the execution of certain mortgages on the lands, and that a large part of the proceeds of the sale was applied in the discharge of such mortgage indebtedness. In such a case, where the court directs the sale of such lands, including the husband's interest therein, for the purpose of paying the debts so secured, the husband is precluded from denying the power of the court to direct the sale, even where the court's action is assailed in a direct proceeding to that end. *Pearson v. Kepner, supra*; *Herbert v. Rupertus* (1903), 31 Ind. App. 553, 68 N. E. 598. The proceedings for the sale of the lands do not affirmatively disclose whether the court in fact determined the existence of any of such exceptional circumstances, which, if existing, would preclude appellant from inheriting any part of said lands on the decease of his wife, nor does it affirmatively appear whether the existence of the mortgages in the execution of which appellant joined, and which showed an apparent necessity to

sell the lands, was a potent factor in determining the scope of such order.

We would not be understood as indicating that the special circumstances to which we have called attention as possibly or probably existing in the case at bar, and which may or may not have influenced the court's action in directing the sale of the whole of said lands, are necessary in order that this case may be brought within the scope of *Stone v. Elliott, supra*. We merely illustrate that there are circumstances under which the court has direct statutory authority, and authority based on waiver and estoppel to direct the sale of the entire title to the deceased wife's estate, for the purpose of paying the debts of her estate, and as against the positive and direct attack of the husband on the proceedings. It follows that the case at bar would come within the rule announced in *Stone v. Elliott, supra*, even were that decision substantially narrower than it is. On authority of that case, the judgment is affirmed.

NOTE.—Reported in 107 N. E. 683. As to the effect of quashing writ on execution sale, see 15 Am. Dec. 92. See, also, under (1) 31 Cyc 326, 333, 351; (2) 18 Cyc 691; (3) 18 Cyc 797.

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THE PILLSBURY FLOUR MILLS COMPANY v. WALSH  
ET AL.

[No. 8,729. Filed November 5, 1915.]

1. JUDGMENT.—*Arrest of Judgment*.—The only order or judgment necessary where a motion in arrest is sustained is an order arresting the judgment, and in such event each party pays his own costs and the plaintiff may proceed *de novo* in a fresh action. p. 82.
2. APPEAL.—*Orders Appealable*.—*Arrest of Judgment*.—An order in arrest of judgment puts an end to the case in the court below, and is a disposition thereof from which an appeal will lie. p. 83.
3. SALES.—*Breach of Contract*.—*Remedy of Seller*.—On the purchaser's breach of a contract of sale of goods the seller may retain or store the property as and for the purchaser and sue him on the contract for the entire purchase price, or he may sell the goods for

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and as the agent of the purchaser and recover from him the difference between the amount obtained and the contract price, or he may keep the property as his own and recover the difference between the contract price and market price at the time and place of delivery. p. 83.

4. **SALES.—*Anticipatory Breach of Contract.—Remedy of Seller.***—In cases where the doctrine of anticipatory breach of contract is applicable, the seller of goods, on the repudiation of the contract by the purchaser, may accept the repudiation and treat the contract as rescinded for all purposes except that of predicated damages thereon for its breach, and may then, before the time of performance, sue for damages for an anticipatory breach, in which event the measure of damages is ordinarily the difference between the contract price and the price at the place of delivery at the time of the repudiation. p. 84.
5. **SALES.—*Breach of Contract.—Action by Seller.—Complaint.***—Where, on the purchaser's breach of a contract for the sale of goods, the seller has chosen either to retain or store the property as and for the purchaser, or to sell the same for and as the agent of the purchaser, the complaint in an action for damages against the purchaser must allege facts showing the seller's right to the remedy chosen, and in either case that possession of the property was retained for the purchaser, and, if sale of the property has been made, that such sale was made by the seller for and as the agent of the purchaser after proper notice of intention to sell; but an exception as to notice exists in cases where the property is of a perishable nature. p. 84.
6. **SALES.—*Breach of Contract.—Remedy of Seller.***—Where, on the purchaser's breach of a contract for the sale of goods, the seller elects to keep the property as his own and recover the difference between the contract price and the market price at the time and place of delivery, it is immaterial whether the seller keeps or sells the property so retained, or at what price it is sold, if he sells same. p. 86.
7. **PLEADING.—*Sufficiency.—Aider by Evidence.***—The sufficiency of a pleading, either on demurrer or on a motion in arrest of judgment, must be determined from its own averments without reference to the evidence. p. 88.
8. **JUDGMENT.—*Arrest of Judgment.***—The power to arrest a judgment is inherent in all courts of general common-law jurisdiction, and the exercise of such power is a means by which the court or judge refuses to give a judgment in a cause, though it be regularly decided, where it appears either that no cause of action exists, that the cause of action is not set forth with precision or accuracy, or that a judgment rendered in favor of the prevailing party would be erroneous or reversible; and the motion for arrest is in the nature of a demurrer to the facts of the whole case as presented by the record, exclusive of the evidence given on the trial, and is an appeal to the



law for want of some essential without which a judgment thereon would be erroneous. p. 88.

9. JUDGMENT.—*Arrest of Judgment.*—Generally a judgment will not be arrested if there is one good count to which the verdict can be applied. pp. 89, 90.
10. SALES.—*Breach of Contract.*—*Special Damages.*—*Pleading.*—*Proof.*—If special damages are relied on by the seller of goods in an action against the purchaser for breach of the contract, the facts on which they are based must be specially pleaded, but those damages ordinarily flowing from the breach of the contract complained of are provable under a general averment that the plaintiff was damaged in a specified sum by the breach of the contract sued on. p. 90.
11. PLEADING.—*General and Special Averments.*—*Inconsistency.*—Specific averments, when inconsistent with a general averment, will control, and in such case the sufficiency of the pleading will be determined from the specific averments. p. 91.
12. SALES.—*Breach of Contract.*—*Complaint.*—*Sufficiency on Motion in Arrest of Judgment.*—A paragraph of complaint against a purchaser for his breach of a contract for 500 barrels of flour, alleging that 275 barrels were received and paid for by the purchaser, that the remaining 225 barrels were shipped to purchaser, who refused without cause to accept same, and that on account of such refusal plaintiff was "compelled to and did sell the flour for the best price obtainable at that time," and that the flour was sold at a certain price, though not directly averring that the flour was sold at the market price at the time and place of delivery, warranted the inference that such was the case, and was sufficient as against a motion in arrest of the judgment. p. 91.
13. PLEADING.—*Complaint.*—*Attack by Motion in Arrest of Judgment.*—A complaint is subject to attack by a motion in arrest of judgment only where its defects are not cured by the verdict, or the statute of amendments, or are not waived by a failure to demur. p. 92.
14. PLEADING.—*Complaint.*—*Failure to Demur.*—*Motion in Arrest of Judgment.*—*Review.*—Where the defect in a complaint consists merely in the omission of some averment which, if present in the complaint, would make a good cause of action, a failure to demur under §§344, 348 Burns 1914, Acts 1911 p. 415, waives such defect or omission, and, in determining whether a motion in arrest of judgment was properly sustained, the court on appeal must treat the complaint as sufficient to meet the proper proof and will not look to the evidence to see whether such proof was in fact made. p. 93.
15. APPEAL.—*Questions for Review.*—*Arrest of Judgment.*—*Motion for New Trial.*—Where, on appeal from an order in arrest of judgment, the appellant has incorporated in the record appellee's motion for a new trial, filed prior to the motion in arrest, containing



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the assignment that the verdict is not sustained by sufficient evidence, and the appellee contends that there was a failure to prove certain essentials claimed to have been omitted from the averments of the complaint, the court on reversing the order in arrest of judgment, should determine whether the evidence is sufficient upon which to rest a judgment on the verdict. p. 94.

16. SALES.—*Breach of Contract.—Action Against Purchaser.—Evidence.*—Paragraphs of complaint against the purchaser of flour proceeding on the theory that plaintiff manufactured the flour according to the terms of the contract of sale, that plaintiff was at all times ready and willing to perform all the conditions of the contract on its part to be performed, and that at the time fixed for delivery plaintiff had the flour on hand and was ready and willing to deliver in compliance with the contract, were not established by evidence showing that no flour was manufactured for delivery under such contract, but that when the order was received plaintiff bought the wheat necessary to make the flour, and that on being notified that purchaser would not take the flour plaintiff cancelled the order and charged purchaser with the difference between what had been paid for the wheat and what could be realized for the flour. p. 95.

17. SALES.—*Breach of Contract.—Action Against Purchaser.—Evidence.*—A verdict for plaintiff based on paragraphs of complaint charging that plaintiff shipped flour to a purchaser in pursuance to the contract, which the latter refused to accept, and that plaintiff was compelled to and did sell the flour at the best price obtainable for a stated sum, was sustained by sufficient evidence, where the shipment of the flour to the place designated, and its refusal, were shown, and the evidence as to the subsequent sale of the flour by plaintiff was of such character as to justify the jury in inferring the market price of the flour in question at the time and place of its delivery under the contract. p. 96.

From Superior Court of Vanderburgh County;  
*F. M. Hostetter*, Judge.

Action by The Pillsbury Flour Mills Company against William P. Walsh and another. Verdict for plaintiff, and from an order in arrest of the judgment, the plaintiff appeals. *Reversed.*

*Woodfin D. Robinson* and *William E. Stilwell*, for appellant.

*John R. Brill*, *John W. Brady* and *Frank H. Hatfield*, for appellees.

HOTTEL, J.—This is an appeal from a judgment in

appellees' favor in an action brought by appellant to recover damages for breach of contract. The complaint as originally filed was in two paragraphs, each predicated on a written contract for the sale of flour. The allegations of the first paragraph necessary to an understanding of the questions herein discussed are in substance as follows: On October 17, 1910, appellant sold to appellees 1,000 barrels of "XXX" patent flour at \$5 a barrel, to be paid for in cash on delivery at Evansville on or about May 1, 1911. In the sale and purchase of the flour appellant and appellees entered into a written contract filed with and made a part of such paragraph. On March 13, 1911, appellees repudiated the contract and advised appellant by letter that they refused to accept any of the flour so purchased by them. On May 1, 1911, appellant had on hand said 1,000 barrels of flour and, was then ready and willing to deliver it in compliance with the terms of said contract. Appellees then refused, and have continuously since said date refused, to accept and pay for the flour pursuant to the agreement. At the time of the delivery, May 1, 1911, the flour was worth only \$4 a barrel and appellant was compelled to and did sell the same at that price. Appellant was at all times ready and willing to perform all the conditions of the contract on his part to be performed and appellees at all times, after March 13, 1911, refused to comply with the terms of said contract and refused to accept and receive said flour and in all respects repudiated said contract all to appellant's damage in the sum of \$1,000. The contract filed with this paragraph is as follows:

Pillsbury-Washburn Flour Mills Co., Ltd.

Agreement made at.....

No. 517. Date 10-17, 1911.

Sold to Walsh Baking Co.

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Address.....

Ship to Evansville, Ind.

Via.....

From.....

When: May, 1911.

Terms: A.D.

Number

Packages.	Size.	Kind.	Brand.	Price.
1000 bbl.	bulk	XXXX	Patent	5.00

Del. at Evansville.

Scott, Salesman.

In consideration of above terms, I hereby  
purchase and agree to take above goods.

Signature of Purchaser, Walsh Bak. Co.

W. P. Walsh.

The second paragraph is substantially the same as the first, except it is predicated on a contract of date of October 12, 1910, for 500 barrels of flour at \$5.15 a barrel, to be delivered at Evansville March 3, or 4, 1911, and alleging that 275 barrels of such purchase by appellees were shipped to them at Evansville and were paid for by them according to the terms of said contract; that afterwards, to-wit, on March \_\_, 1911, appellant shipped to appellees at Evansville the balance of the flour so purchased by them, to-wit, 225 barrels; that such flour arrived at Evansville in due time and appellees, without any cause whatever, refused to accept and receive said flour and ever thereafter refused to accept and pay for said flour pursuant to said contract; that on account of appellees' refusal to accept and pay for said flour "appellant was compelled to and did sell said flour at the best price obtainable at that time; that by the terms of their contract appellees agreed to pay \$5.15 a barrel for the flour, and appellant, on account of their refusal to accept and pay for said flour as aforesaid, was compelled to and did sell said

flour at and for the price of \$4.25 a barrel.” The third paragraph is substantially the same as the first, except it alleged that the contract for the sale of the 1,000 barrels of flour was verbal and that a memorandum of such sale was at the time signed by the parties. The fourth paragraph is substantially the same as the second, except it alleges a verbal sale and purchase of the 500 barrels of flour and omits the averment that appellant “was compelled to and did sell said flour for the best price obtainable at that time.”

To the third and fourth paragraphs appellees filed a demurrer for want of facts which was overruled. There was an answer in four paragraphs to each paragraph of complaint and a reply in general denial. A trial by jury resulted in a verdict in appellant’s favor. A motion for new trial filed by appellees was overruled. Appellees then filed a motion in arrest of judgment which motion was sustained and the court entered a final order that appellant “take nothing by its action and that judgment on the verdict herein rendered be arrested, and forever rest.” From this final order appellant appeals and assigns as error the court’s ruling on the motion in arrest of judgment and the action of the court in rendering the final order.

We are first met with an insistence by appellees that the words of the final order, “that the plaintiff take nothing,” are mere surplusage and should

1. be disregarded; that on a motion in arrest neither party is entitled to a judgment against the other, and hence that such an order is not one from which an appeal will lie. It is true that where a motion in arrest of judgment is sustained no judgment for either party is contemplated. The only order or judgment necessary in such case is an order arresting the judgment. “Each party pays his own

costs and the plaintiff is at liberty to proceed *de novo* in a fresh action." *Crawford v. Crockett* (1876), 55 Ind. 220; *Raber v. Jones* (1872), 40 Ind. 436, 441 and cases cited. It seems to be well settled, how-

ever, that such an order puts an end to the

2. case in the court below, and is a disposition of the case from which an appeal will lie. *Powell v. Kinney* (1843), 6 Blackf. 359, 360; *State v. Scott* (1840), 5 Blackf. 460, 461, note; *Daugherty v. Midland Steel Co.* (1899), 23 Ind. App. 78, 82, 53 N. E. 844, and cases cited.

In support of the action of the trial court in arresting the judgment it is claimed by appellees that neither paragraph of the complaint states facts

3. sufficient to constitute a cause of action. Our first inquiry, therefore, should be to ascertain what are the essential averments of a complaint for breach of contract for the sale of personal property. The decided cases indicate that in such actions the vendor has his choice of either of at least three remedies, viz., (1) He may retain or store the property as and for the vendee, and sue such vendee on the contract for the entire purchase price. (2) He may sell the property for and as the agent of the vendee, for his, the vendor's, account and recover of the vendee the difference between the contract price and the price obtained on such resale. (3) He may keep the property as his own and recover the difference between the contract price and the market price at the time and place of delivery. *Dwiggins v. Clark* (1884), 94 Ind. 49, 53, 48 Am. Rep. 140; *Pittsburgh, etc., R. Co. v. Heck* (1875), 50 Ind. 303, 308, 19 Am. Rep. 713; *Ridgley v. Mooney* (1896), 16 Ind. App. 362, 366, 45 N. E. 348; *Dill v. Mumford* (1898), 19 Ind. App. 609, 612, 49 N. E. 861; *Shipp v. Atkinson* (1894), 8 Ind. App. 505, 36 N. E. 375.

While the authorities cited expressly recognize only the three remedies indicated, it occurs to the court that if the doctrine of anticipatory breach of contract is applicable to contracts like the one under consideration, a fourth remedy would be authorized, viz., on the repudiation of the contract by the vendee the vendor may accept such repudiation, and treat the contract as rescinded for all purposes except for the purpose of predicated damages thereon for breach thereof, and if such vendor indicates his election to so treat such repudiation with reasonable promptness thereafter, he may then, before the time of performance, sue for damages as for an anticipatory breach of such contract, in which case he would be entitled to recover the actual damages resulting from the breach, which, ordinarily, would be the difference between the contract price of the goods sold and the price of such goods at the place of delivery but at the time of repudiation. In such case the controlling date in ascertaining the damages would be the date of repudiation of the contract rather than the date of its performance. For the purposes of this case, however, we need not decide whether the doctrine of anticipatory breach of contract has any application to cases of this character because it is apparent from the averments of each paragraph of the complaint that neither of them proceeds on such theory. We therefore leave such question open for decision when the necessity therefor arises.

The vendor's right to pursue either of the first two remedies, above indicated, is dependent on whether the contract has been fully executed by him in so far as complete execution is possible by him, that is to say, the vendor's right to choose either of such remedies depends on whether he has done and performed all that was necessary to

be done and performed by him under the contract, including all the acts necessary to place title and constructive possession in the vendee. While the vendor in choosing either of such remedies may retain actual possession of the property involved, and, by choosing the second remedy, may also sell such property, yet the averments of the complaint in either of such cases must be such as to show that the vendor retained such possession for the vendee; and where the second remedy, *supra*, is chosen the facts pleaded must also show that the sale of the property was for and as the agent of the vendee, and that such sale was preceded by proper notice of intention to sell. *Dwiggins v. Clark, supra*; *Shipps v. Atkinson, supra*; *Dill v. Mumford, supra*; *Hayden v. Demets* (1873), 53 N. Y. 426; *Indianapolis, etc., R. Co. v. McGuire* (1878), 62 Ind. 140; *Fell v. Muller* (1881), 78 Ind. 507; *Shawhan v. Van Nest* (1874), 25 Ohio St. 490, 18 Am. Rep. 313; *Pittsburgh, etc., R. Co. v. Heck, supra*. In the latter case the court at page 306 said: "It is conceived that in all cases of contracts for the sale of personal property, where it has any market value, the vendor, before he can recover of the vendee the contract price, must have delivered the property to the vendee, or have done such acts as vested the title in the vendee, or would have vested the title in him, if he had consented to accept it; for the law will not tolerate the palpable injustice of permitting the vendor to hold the property and also to recover the price of it." In *Dwiggins v. Clark, supra*, 54, the court quotes with approval from *Hayden v. Demets, supra*, the following: "Upon a valid sale of specific chattels, when nothing remains to be done by the vendor except delivery, whether conditioned upon payment or not, the right of property passes to the vendee, at whose risk it is retained by the vendor. The same consequence as to title



results from a valid tender, upon an executory contract. Upon the refusal of the vendee to accept and pay the price, the vendor, upon proper notice, may sell the property and recover the difference, or he may sue for the difference between the contract and actual price, in which case he elects to retain the property as his own; or he may recover the contract price, in which case he holds the property as trustee for the vendee, and is bound to deliver it, whenever demanded, upon receiving payment of the price. In selling the property after tender and refusal, the vendor acts as the agent and trustee of the vendee, to whom the title is deemed to have passed by the tender. The right of the vendor to recover the price of the goods, if he chooses to risk the solvency of the vendee, necessarily results."

It appears that in some jurisdictions the notice mentioned in connection with the second remedy, *supra*, is held to be unnecessary, but the great weight of authority, including the decisions of both courts of appeal of our own State, approves the rule requiring such notice except in cases where the goods are of a perishable nature. *Redmond v. Smock* (1867) 28 Ind. 365; *Ridgley v. Mooney, supra*; *Dill v. Mumford, supra*.

The third remedy, above indicated, unlike the other two, contemplates that title to the property, covered by the breached contract sued on,

6. remains in the vendor, or at least is not transferred to the vendee under such contract, and in such case after the vendee's refusal to carry out the contract and pay for such goods, and after the time of performance has passed, it is wholly immaterial whether the vendor keeps or sells the property so retained or at what price he sells, if he sells; because the rule of damages in such cases is the actual injury or damage sustained, which ordi-



narily is the difference between the contract price and the market value of the property at the time and place of delivery. See *Dill v. Mumford*, *supra*, 612; and other cases cited, *supra*.

In the instant case it is not claimed by either appellant or appellees that either paragraph of the complaint seeks to recover the contract price for the flour sold, and hence the insufficiency of either of such paragraphs to entitle appellant to the first remedy, *supra*, need not be considered. It is claimed, however, by appellees that neither paragraph of the complaint states a cause of action for the reason that the market value of the flour at the time and place of delivery, or a preliminary notice to resell, is not alleged or shown in either paragraph. In answer to this contention appellant asserts, in effect, that each paragraph proceeds on the theory that the contract sued on was executory; that both title and possession to the flour remained in the vendor and, hence, that it was not necessary to allege a notice to resell. By this concession appellant eliminates from its contention any claim that either paragraph states facts sufficient to entitle it to either the first or second remedy, *supra*. The only question left for our determination therefore is whether the several paragraphs of complaint state facts sufficient to state a cause of action entitling appellant to the third remedy above indicated. It is, in effect, conceded by appellant that neither paragraph of its complaint expressly avers the market value of flour at the time and place of delivery expressed in the contract sued on, but it is insisted that such omitted averment may be implied from the other averments of such respective paragraphs; that taking each paragraph in its entirety, the complaint is sufficient to bar another action and hence that the defect or omission, if any,

was cured by the verdict, the statute of amendments and failure to demur; and that proof was in fact given without objection, proving such omitted averments. In answer to this last contention it is

sufficient to say that the sufficiency of a

7. pleading must be determined from its own averments without reference to the evidence.

*Dill v. Mumford, supra; Pape v. Kaough* (1899), 23 Ind. App. 525, 529, 55 N. E. 775; *Spencer v. Spencer* (1894), 136 Ind. 414, 36 N. E. 210; *American Plate Glass Co. v. Nicoson* (1905), 34 Ind. App. 643, 656, 73 N. E. 625. There may be and, in fact, is some conflict in the decided cases as to whether, for the purpose of determining whether harm has resulted from an erroneous ruling on a demurrer to a pleading, the appellate tribunal should look to the record to see whether evidence was in fact offered and heard by the trial court, without objection, on the issue which should have been tendered by an averment necessary to, but absent from, such pleading so held sufficient against demurrer; but all the cases hold that the question of the sufficiency of the pleading against demurrer must, of course, be determined from its own averments alone. *Chicago, etc., R. Co. v. Chaney* (1912), 50 Ind. App. 106, 97 N. E. 181. So likewise in determining the sufficiency of the complaint against a motion in arrest of judgment, this court will look to the averments of the complaint alone and not to the evidence.

Such a motion is of common-law origin, and the power to arrest a judgment is inherent in all courts of general common-law jurisdiction and the

8. exercise of such power at common law "is the method by which a court or judge refuses to give judgment in a cause, though it be regularly decided, where it appears either that no cause of ac-

tion exists, that the cause of action is not set forth with precision or accuracy, or that it appears from the record that if judgment were rendered in favor of the prevailing party it would be erroneous or reversible. The motion is in the nature of a demurrer to the facts of the whole case as presented by the record, and is an appeal to the law, for want of some essential, without which a judgment or sentence thereon becomes erroneous. It does not reach the sentence or judgment itself, \* \* \* the whole record is brought under review, and the court may amend the record before deciding the motion. Matters outside the record will not be considered, nor can evidence be introduced to support the application. The record consists not only of what is written on the record book and authenticated by the judge, but also all indictment pleadings and papers referred to by the record book and thereby made a part of the record, and the motion itself is a part of the record, \* \* \*. The evidence given on the trial is not part of the record

for this purpose, nor will the sufficiency of

9. the evidence, or knowledge derived from the evidence, be considered on a motion in arrest of judgment. \* \* \* Arrest of judgment was granted at common law where it appeared that notwithstanding the issue of fact was regularly decided, the complaint was either not actionable in itself, or not made with sufficient precision and accuracy. It arose from intrinsic causes appearing upon the face of the record. Exceptions moved in arrest of judgment were required to be more glaring and material than on demurrer, and many inaccuracies and omissions which would have been fatal on demurrer were cured by a subsequent verdict." 2 Standard Ency. Proc. 982-989. See also, 23 Cyc 824-834; *Bright v. State* (1883), 90 Ind. 343. It is

also the general rule that the judgment will  
 9. not be arrested “if there be one good count to which the verdict can be applied; that is, a motion in arrest will not prevail unless all the counts are so defective as not to have been cured by the verdict.” 23 Cyc 829. See, also, *Powell v. Bennett* (1892), 131 Ind. 465, 467, 30 N. E. 518, and cases cited; *Sims v. Dame* (1888), 113 Ind. 127, 131, 15 N. E. 217; *Louisville, etc., R. Co. v. Fox* (1885), 101 Ind. 416, 418; *Baddeley v. Patterson* (1881), 78 Ind. 157, 159; *Spahr v. Nicklaus* (1875), 51 Ind. 221, 223; *Kelsey v. Henry* (1874), 48 Ind. 37; *Newell v. Downs* (1847), 8 Blackf. 523; *Gilmore v. Ward* (1899), 22 Ind. App. 106, 52 N. E. 810.

There are expressions contained in some of the decided cases, especially *Dill v. Mumford*, *supra*, and *Ridgley v. Mooney*, *supra*, that indicate

10. that a complaint, to be sufficient to entitle the plaintiff to the third remedy before indicated herein, must contain an averment of the market price of the goods sold at the time and place of delivery, or the equivalent of such averment. This, we think, was a correct statement of the law as applied to those cases, because in each of those cases the complaint set out specifically the facts on which damages were predicated and contained no general averment of damages resulting from the breach of the contract. In such a case it was necessary that the specific facts pleaded should contain the averment indicated or its equivalent. There are other cases, however, that, by implication at least, hold that in such respect a complaint will be sufficient if it contains a general averment that plaintiff was damaged in a specified amount on account of the breach of the contract sued on, and that under such general averment the plaintiff will be permitted to

prove any damages which would usually and ordinarily flow from the breach of a contract of the character of that on which the action is predicated. *Dwiggins v. Clark*, *supra*, 56; *Lindley v. Dempsey* (1873), 45 Ind. 246, 248, 249; *Wolf v. Schofield* (1871), 38 Ind. 175, 182, 183; *Hadley v. Prather* (1878), 64 Ind. 137, 140; *Dunn v. Johnson* (1870), 33 Ind. 54; *Shipps v. Atkinson*, *supra*. The authorities all agree, of course, that if special damages are relied on, the facts on which they are based must be specially pleaded, but under the authorities those damages which would usually and ordinarily flow from the breach of contract complained of are provable under a general averment that the plaintiff was damaged in a specified sum by the breach of the contract sued on. To prove such general averment of damages the plaintiff would, of course, be required to make his proof in accord with the law as hereinbefore announced, that is to say, the plaintiff in such case would ordinarily be required to prove the market price of the goods sold at the time and place of delivery.

Each paragraph of complaint in the instant case contains a general averment of damages like or similar to that above set out as contained in

11. the first paragraph. Each paragraph, however, contains specific averments on the same subject, and such averments when inconsistent with a general averment will control, and in such

12. case the sufficiency of the pleading will be determined from the specific averments rather than such general averment (*Atkins v. Kattman* [1912], 50 Ind. App. 233, 97 N. E. 174; *F. Bimel Co. v. Harter* [1912], 51 Ind. App. 267, 98 N. E. 360; *Chicago, etc., R. Co. v. Dinius* [1908], 170 Ind. 222, 84 N. E. 9; *Southern R. Co. v. Elliott* [1908], 170 Ind. 273, 82 N. E. 1051; *Cleveland, etc., R. Co. v.*

*Clark* [1912], 51 Ind. App. 392, 97 N. E. 822); but in this case, especially as to the second paragraph of complaint, there is no conflict or inconsistency between the general averment and the special averments on the same subject. Indeed, in said second paragraph, the specific averment that appellant "was compelled to and did sell the flour for the best price obtainable at that time," taken in connection with the other averments of such paragraph that the flour had been shipped to Evansville pursuant to the contract and that it arrived there, is almost the equivalent of the said absent averment. A sale at the best price obtainable would certainly be as high, at least, as the market price. "Best price obtainable" is completely comprehensive and necessarily includes "market price," and the words, "at that time," refer to the time when the flour reached Evansville and was refused, which under the other averments of the complaint was inferentially, if not necessarily, the time when delivery at Evansville was due under the contract. True there is no direct averment that the flour was sold at Evansville, the place of delivery, but we think that an inference that the flour was sold there, reasonable and justifiable in view of the other facts alleged, and hence, under the later decisions of our courts, might be indulged even as against a demurrer. *Domestic Block Coal Co. v. DeArme*y (1913), 179 Ind. 592, 100 N. E. 675, 102 N. E. 99.

Whether, however, such paragraph would be sufficient against demurrer we need not decide, because there is a well-defined distinction between an  
13. attack on a complaint by demurrer and an attack by a motion in arrest. This has frequently been recognized and expressed by the decided cases, the latter attack being available only in those cases where the defects are not cured by the

verdict or the statute of amendments or waived by a failure to demur. *Parker v. Clayton* (1880), 72 Ind. 307, 308; *McCormick v. Mitchell* (1877), 57 Ind. 248, 251, and cases cited; *Jones v. Ahrens* (1889), 116 Ind. 490, 491, 19 N. E. 334; *Powell v. Bennett, supra*; *Chapell v. Shuee* (1889), 117 Ind. 481, 486, 487, 20 N. E. 417, and cases cited. We believe that, under these cases, the second paragraph of complaint was sufficient against a motion in arrest.

Thus far we have considered the ruling on said motion in the light of the law as it has been expressed before the amendment of §§344, 348 Burns 1908, §§339, 343 R. S. 1881, by the act of 1911.

14. Acts 1911 p. 415, §§344, 348 Burns 1914.

Section 348 Burns 1914 provides as follows:

“Where any of the matters enumerated in section 85 (§344 Burns 1914) do not appear upon the face of the complaint, the objection (except for the misjoinder of causes), may be taken by answer. *If no such objection is taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, except* (our italics) only the objection to the jurisdiction of the court over the subject of the action; *Provided, however,* That the objection that the action was brought in the wrong county, if not taken by answer or demurrer, shall be deemed to have been waived.” Appellees did not demur to either the first or second paragraph of the complaint and hence, under the statute, *supra*, they will be deemed to have waived any defects therein except the objection to the jurisdiction of the court over the subject-matter. Appellees, however, insist that the evidence has been brought into the record and that an examination of it will disclose that no evidence was offered on the omitted averment, and hence that appellant is in no position to complain of the court’s



ruling. We have already, in effect, disposed of this contention. We may say further, however, that this court, under the statute, *supra*, will assume that any defect in the pleadings was cured by the evidence, if from the affirmative facts pleaded it might have been so cured. Where the defect consists merely in the omission of some averment which, if present in the complaint, would make a good cause of action, a failure to demur under the statute, *supra*, waives such defect or omission and, as against an attack of the kind here made, the appellate tribunal must treat the pleading as sufficient to admit the proper proof and, in determining whether such motion was properly sustained, will not look to the evidence to see whether such proof was in fact made. In case there was a failure to prove the omitted averment the defendants have their remedy. A motion for new trial seasonably made and containing the ground that the verdict or decision is not sustained by the evidence, in effect, presents the same question.

The sufficiency of the first and second paragraphs of complaint being, in effect, admitted by appellees' failure to demur thereto, it is not necessary for the purposes of the question under consideration that we determine the question of the sufficiency of the other paragraphs. See cases cited, *supra*. The trial court committed error in sustaining the motion in arrest of judgment, and for such error the judgment below must be reversed.

However, as before indicated, appellant has seen fit to incorporate in the record appellees' motion for new trial. The record discloses that such motion was filed before the motion in arrest and, as one of its grounds alleges that the verdict of the jury was not sustained by sufficient evidence. Appellant has also incorporated in the record the



general bill of exceptions containing the evidence and it is contended by appellees that an examination of the evidence will disclose that there was also a failure to prove the necessary averments claimed by appellees to have been omitted from each paragraph of the complaint. Such being the state of the record we feel that in the interest of justice it is not only proper, but that it is the duty of the court, to examine the record with a view of determining whether the evidence is sufficient upon which to rest a judgment on the verdict; because if the evidence is not sufficient for such purpose this court, in reversing the judgment below, instead of ordering the trial court to render judgment on the verdict, may instruct such court to grant the new trial. *Myers v. Winona, etc., R. Co.* (1915) 58 Ind. App. 516, 106 N. E. 377; *Inland Steel Co. v. Kiessling* (1910), 174 Ind. 630, 634, 91 N. E. 1084; *Childress v. Lake Erie, etc., R. Co.* (1914), 182 Ind. 251, 259, 105 N. E. 467. Our examination of the evidence

convinces us that appellant wholly failed to

16. prove the averments of either the first or third paragraph of its complaint. It will be observed from the averments contained in each of the paragraphs, hereinbefore indicated, that each proceeds on the theory that appellant manufactured the flour according to the terms of the contract upon which such paragraph was based and, that appellant was at all times ready and willing to perform all the conditions of such contract on its part to be performed; "that on \* \* \* (May 1, 1911), this plaintiff had on hand said 1,000 barrels of flour and at said time was ready and willing to deliver said flour in compliance with the terms of said contract." Appellant's own evidence in support of these paragraphs was in substance as follows: "We never manufactured the flour to be delivered

under such contract. On the contrary we followed a custom usually followed by us in such cases, viz. When we received appellees' order for the 1,000 barrels of flour we bought the wheat necessary to make the flour to fill such order and afterwards in March when we were notified by appellees that they would not take any more flour we cancelled the order for the 1,000 barrels. We did not manufacture the 1,000 barrels. We received information from Walsh long before the flour was to be delivered that he would not accept it, and then we simply cancelled the order because he had told us in advance that they would not take it. We get telegrams from our salesmen as to the flour they have sold and we immediately buy wheat to protect ourselves. When Walsh refused to take this flour we charged him with the difference between what we had paid and what we could get." This evidence wholly fails to show full performance by appellant of its contract in so far as performance was possible by it and wholly fails to show an ability and readiness to perform at the time and place of performance and hence is not sufficient to support a verdict based on either the first or third paragraphs of complaint.

We next inquire whether the evidence was sufficient to sustain the verdict of the jury on either the second or fourth paragraphs of complaint.

17. The evidence affecting the question on which the controversy turns is substantially as follows: The contract shows that the flour was to be delivered to appellees March 3 or 4, 1911. The flour was delivered and appellees refused to accept or pay for it. Appellees refused to accept any more flour on their orders about March 10. The market value at this time was about 60 cents cheaper, both in Minneapolis and Evansville. The market was the same in Evansville as in Minneapolis, except differ-

ence in freight. At the time appellees repudiated their contract flour was 60 cents cheaper on the barrel in Evansville than it was when it was sold to appellees. Flour is always sold depending on the price of wheat. After appellees' refusal to accept the flour, to wit, on April 3, 1911, appellant notified its agent, Mr. Scott, by wire and by letter to go to Evansville and sell as quickly as he could the 225 barrels of flour then at Evansville on the track and refused by appellees. After receiving these instructions and pursuant thereto Mr. Scott called on Mr. Rastetter, a baker in Evansville, Fred Baker, and Ziliak & Shafer and tried to sell the flour to each of them. He sold the flour to Ziliak & Shafer for \$4.25 a barrel, that being the "best price he could obtain there in Evansville".

Appellant's witness, Mr. Smith, testified in substance as follows: The price of flour is controlled by the price of wheat, if wheat goes up or down the price of flour does likewise. There is practically very little variation in the price of flour compared to the price of wheat. The price of wheat in Minneapolis, Minn., in October, 1910, was about \$1.06½ cents a bushel. In March, 1911, it was about 94½ cents to 95 cents a bushel. Flour would decline correspondingly. Wheat began to go down shortly after the first of November, 1910. Went down until about the 10th to 15th of March, 1911. One cent a bushel wheat affects the market on flour about five cents per barrel. This would affect the market price of flour everywhere in the markets of the United States. Prices are based f. o. b. Minneapolis with freight added to all points.

The jury returned a verdict for appellant in the sum of \$112.50. Appellees, in effect, admit that the jury was properly instructed on the measure of dam-

ages, but insist that there was no evidence showing the market value of flour in Evansville at the time provided in the contract for delivery. It is true that each paragraph proceeds on the theory that appellant did and performed all that it was required to do or perform under the contract and that appellees refused performance after performance was due on their part. In such case, as before indicated in this opinion, the time of performance of the contract by delivery of the flour, rather than the time of repudiation of the contract is controlling in fixing the amount of damages resulting from appellees' failure to perform. However, the evidence shows a close proximity of these dates and there was evidence tending to show the entire range of the decline of wheat from the time of the making of the contract up to and beyond the time of delivery and, also tending to show that the market price of flour is fixed by the market price of wheat. Appellant's agent, Scott, also testified that he sold the flour for all he could obtain for it in Evansville. Taking the evidence in its entirety we think it was sufficient to justify the jury in inferring the market price of the flour in question at the time and place of its delivery under the contract, and hence sufficient to afford the jury a proper basis upon which to estimate appellant's damage for the breach of its contract, within the meaning of the law as given by the trial court and expressed in the decisions herein cited. Such being the case this court would not be warranted in directing a new trial on account of the insufficiency of the evidence. The judgment below is therefore reversed with instructions to the trial court to render judgment on the verdict of the jury and for such other proceedings as may be proper and consistent with this opinion.

NOTE.—Reported in 110 N. E. 96. On right to recover purchase

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price where purchaser wrongfully repudiates his contract, see 51 L. R. A. (N. S.) 735. On resale to fix damages for refusal of purchaser to accept goods, see 42 L. R. A. (N. S.) 669. Motions in arrest of judgment as waiver of right to move for new trial, see Ann. Cas. 1914 B 612. See, also, under (1) 23 Cyc 834, 835; (2) 3 C. J. 509; (3) 35 Cyc 520, 536, 583; (4) 35 Cyc 583, 592; (5) 35 Cyc 525, 586; (6) 35 Cyc 598; (7) 31 Cyc 322; (8) 23 Cyc 824, 827, 834; (9) 23 Cyc 829; (10) 35 Cyc 587; (11) 31 Cyc 85; (13) 23 Cyc 831; (14) 23 Cyc 830; 31 Cyc 720; (15) 3 Cyc 454; (16) 35 Cyc 591.

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AVERY ET AL. v. VAIL ET AL.

[No. 9,207. Filed April 23, 1915. Rehearing denied June 22, 1915. Transfer denied November 17, 1915.]

1. STATUTES.—*Construction.—Parts of Act.*—Sections 2990-2994 Burns 1914, §§2467-2471 R. S. 1881, of the statute of descent, are all parts of the act of 1852 (1 R. S. 1852 p. 248), and the language employed should be reasonably construed and meaning be given to all portions of the act where that can be done by fair and reasonable interpretation of the whole act. p. 103.
2. DESCENT AND DISTRIBUTION.—*Right of Inheritance.—Statutes.*—Persons claiming to inherit property must base their right on some statutory provision, and it is the purpose of the statute of descent (§2990 et seq. Burns 1914, §2467 et seq. R. S. 1881) to provide for the disposition of the property of persons dying intestate, under all conditions and circumstances that may arise. p. 104.
3. DESCENT AND DISTRIBUTION.—*Cousins.—Representation.*—Under the provisions of §2994 Burns 1914, §2471 R. S. 1881, of the statute of descent, construed in connection with §§2990-2993 Burns 1914, §§2467-2470 R. S. 1881, the rule of inheriting by representation does not apply in favor of the descendants of a deceased member of a class of collateral kindred entitled to take thereunder, so that where an intestate's nearest relatives in the order of inheritance are first cousins, they take to the exclusion of descendants of other first cousins. p. 104.

From Clinton Circuit Court; *Joseph Combs*, Judge.

Action by Rebecca Vail and others against Elwood Avery and others. From the judgment rendered, Elwood Avery and others appeal. *Reversed.*

*J. Frank Hanly* and *William P. Evans*, for appellants.

*James V. Kent and Thomas M. Ryan*, for appellees.

FELT, J.—This suit was brought for partition and to quiet title to real estate. The undisputed facts show that Robert Andrew died intestate, the owner of the real estate in controversy, and left as his only surviving relatives, certain first, second and third cousins. The amended petition for partition was filed by certain second and third cousins against appellants and a large number of persons, some of whom were alleged to have no interest in the real estate, but it was further alleged that the plaintiffs and a large number of the defendants were the owners in fee simple as tenants in common of the real estate which is the subject of the litigation. The complaint contains the necessary averments to authorize a judgment quieting the title against certain defendants and alleged that the real estate was not susceptible of division without damage to the several owners, who were alleged to own undivided portions thereof in various proportions, from an one-seventeenth to an one two-hundred-thirty-eighth interest therein. The appellants answered this complaint by general denial. On the issues so formed, the cause was submitted to the court, which found for the plaintiffs and rendered judgment quieting title against certain defendants and made a general finding that the plaintiffs and other defendants, including appellant, Elwood Avery, are the owners in fee simple, as tenants in common, of all the real estate described in the complaint, and that the same can not be divided among the several owners without damage, and ordered that the same be sold and appointed a commissioner to make the sale.

The court did not find and adjudge the interests of the several tenants in common of the land, but

gave direction to the commissioner regarding the sale and the payment of costs and expenses, and then decreed as follows: "The balance remaining in his hands he shall pay to the clerk of this court for distribution among the several owners of said real estate, according to their several interests as the same may hereafter be found and adjudged by the court. It is hereby further ordered by the court that this decree and order shall in no way affect the right, title and interest of any of the parties hereto except those against whom title is quieted, as to their interests in the real estate above described, nor as to the funds arising from the sale thereof by said commissioner, but the rights of each and all of said parties hereto except those against whom title is quieted are hereby transferred to the fund arising from said sale and the interests of said several parties in said fund upon the sale of said real estate shall be hereafter determined by the court."

The land was sold and the funds were paid to the clerk in pursuance of the foregoing decree. The order of sale was made December 19, 1912, and in January, 1914, appellant Elwood Avery, filed his petition asking that the funds be distributed and that all the net proceeds from the sale of the land be paid to the living first cousins of the decedent, as his sole and only surviving heirs under the statute of descents. A like petition was filed by appellant, Daisy Avery, alleging that she was an assignee of Elwood Avery, and had an interest in the funds to be distributed. The appellees filed a cross-complaint in which it was alleged in substance that second cousins whose parents were dead, and third cousins whose parents and grandparents were dead were entitled to inherit by representation. The appellants answered the cross-complaint by general denial and the issues so formed were then tried. The par-



ties duly requested the court to make a special finding of facts and state its conclusions of law thereon, which was accordingly done. The court stated its conclusions of law by which the second and third cousins were adjudged to have an interest in the funds proportionate to their interests in the land which were ascertained by making first cousins the basis of the distribution and allowing second cousins to take by representation the interest of their deceased parents, the cousins of Robert Andrew, deceased, and where a second cousin had died leaving children, the children were given the share that would have gone, under the foregoing rule, to their parent, if living.

Appellants filed a motion for a new trial, as of right; and also for cause, both of which were overruled. From the judgment rendered on the foregoing conclusions of law, appellants have appealed and separately assigned errors in the conclusions of law stated on each finding of facts; in overruling the separate motions of appellants for a new trial as of right; and in overruling the motion for a new trial for cause.

The questions presented by the briefs relate to appellants' right to a new trial as of right, and to the conclusions of law. The findings show the source of the title, that all the parties claim to inherit from Robert Andrew, deceased, and show that he left surviving him ten living first cousins, including appellant Elwood Avery, and numerous second cousins, the children of deceased cousins and several third cousins, the children of a deceased second cousin. No question is made about the correctness of the findings and it is conceded by appellants that if on the facts found second and third cousins are entitled to share at all in the estate, the judgment is right, but it is earnestly insisted that the living first



cousins of Robert Andrew, deceased, are “the next of kin, in equal degree of consanguinity” and therefore entitled to the estate to the exclusion of the second and third cousins, who are of a more remote degree of consanguinity.

Both appellants and appellees claim to inherit by virtue of the provisions of §2994 Burns 1914, §2471

R. S. 1881, but appellees assert that the sec-

1. tion must be construed in connection with §2991 Burns 1914, §2468 R. S. 1881, and that when so interpreted the principle of representation applies to collateral kindred the same as to direct descendants. That part of §2994 Burns 1914, *supra*, material, is as follows: “If there be no person entitled to take the inheritance according to the preceding rules, it shall descend in the following order: *First*. If the inheritance came to the intestate by gift, devise, or descent from the paternal line, it shall go to the paternal grandfather and grandmother, as joint tenants, and to the survivor of them; if neither of them be living, it shall go to the uncles and aunts in the paternal line, and their descendants, if any of them be dead; and if no such relatives be living, it shall go to the next of kin, in equal degree of consanguinity, among the paternal kindred; and if there be none of the paternal kindred entitled to take the inheritance as above prescribed, it shall go to the maternal kindred in the same order.” Section 2990 Burns 1914, §2467 R. S. 1881, provides for the inheritance by children. Section 2991 Burns 1914, §2468 R. S. 1881, provides that grandchildren of the ancestor “shall inherit the share which would have descended to the father or mother, and grandchildren and more remote descendants and all other relatives of the intestate, whether lineal or collateral, shall inherit by the same rule: *Provided*, That if the intestate shall have

left, at his death, grandchildren only, alive, they shall inherit equally.” Section 2992 Burns 1914, §2469 R. S. 1881, provides for inheritance by surviving parents and brothers and sisters, and their descendants. Section 2993 Burns 1914, §2470 R. S. 1881, provides for inheritance by brothers and sisters and their descendants where neither parent is living, and for the inheritance by surviving parents when there are no surviving brothers and sisters or their descendants. The preceding parts of the act having made provision for children, parents, brothers and sisters, and the descendants of children and brothers and sisters, §2994, *supra*, undertakes to make provision where there are no persons entitled to inherit under the rules of such preceding sections. These sections are all parts of the act of 1852 (1 R. S. 1852 p. 248), and the language employed should be reasonably construed and meaning be given to all portions of the act where that can be done by fair and reasonable interpretation of the whole act. *Jackson v. Hocke* (1908), 171 Ind. 371, 376, 84 N. E. 830, and cases cited; *Greenbush Cemetery Assn. v. Van Natta* (1912), 49 Ind. App. 192, 198, 94 N. E. 899. The purpose of the act is to provide for the disposition of the property of

2. persons dying intestate, under any and all conditions and circumstances that may arise, and persons claiming to inherit property in Indiana, must base their right on some statutory provision. *Cloud v. Bruce* (1878), 61 Ind. 171, 175; *Bruce v. Bissell* (1889), 119 Ind. 525, 528, 22 N. E. 4, 12 Am. St. 436.

By the provisions of the first, second, third and fourth sections of the act of 1852, *supra*, and by the decisions of our Supreme Court, the principle of representation is applied to descendants in the direct line from parents and to the

3. ciple of representation is applied to descendants in the direct line from parents and to the

descendants of brothers and sisters under the conditions named in the statute. *Cox v. Cox* (1873), 44 Ind. 368, 379; *Cloud v. Bruce, supra*, 181; *Brown v. Taylor* (1878), 62 Ind. 295, 297; *Blake v. Blake* (1882), 85 Ind. 65, 67. From a consideration of the several sections, *supra*, and especially of the reference to collateral kindred, in §2991 *supra*, we are led to believe that the collateral kindred there referred to are such as are mentioned in §§2, 3 and 4 of the act of 1852, *supra*, being §§2991, 2992, 2993, *supra*. *Blake v. Blake, supra*. By this interpretation we may give a reasonable meaning to the word as used in that section, and ascribe a clear and definite meaning to the introduction to, and the language of §2994, *supra*, which very clearly shows that it was intended to provide not only for the disposition of real estate inherited from either the paternal or maternal line, under certain conditions, but also, to provide for the inheritance of such estates by collateral kindred, more remote than those referred to in the preceding sections, and that upon the failure of uncles and aunts and their descendants, the estate shall go "to the next of kin, in equal degree of consanguinity."

This we believe to be the plain meaning of the statute and we are confirmed in the view by the language quoted with approval in *Cloud v. Bruce, supra*, 180, where these sections were discussed as follows: "While the principle of representation is one that has always been favored by the civil law, and is in accordance with the genius of our statute, it is not one to be applied in every conceivable case, and it is only to be used where the terms of the succeeding sections of the statute make it applicable. \* \* \* 'The fourth section affords another instance where the application of the rule is expressly provided for. The latter part of the fifth section does

not in my opinion afford any room for the application of the principle. In the absence of all persons entitled to take by the preceding sections, and of those who are named as entitled to take in the first clause of the fifth section, it is provided, that the estate "shall go to the next of kin in equal degree of consanguinity." I take this to mean the next of kin who are living at the death of the intestate. To say that it means a class of persons, whose ancestors, if living, would inherit it, it seems to me, would be making a new canon of descent. This we can not do by judicial construction.' " The same case on page 182 quotes with approval from the case of *Clayton v. Drake* (1867), 17 Ohio St. 367, as follows: "We know of no case in which it has ever been held under any of these statutes, that 'next of kin' can be construed so as to include representatives of next of kin." Our Supreme Court also said: "The next of kin are living persons, and take *per capita*. The deceased next of kin could not take; and the statute did not authorize their descendants, they not being in the same degree of consanguinity, to take in their stead."

While it is true the facts in the foregoing case were not identical with those of the case at bar, yet the court considered the identical section here under consideration with a view of ascertaining the meaning of the several sections and gave special consideration to the question of representation as embraced in the several sections and concluded that it did not apply to that part of §5 of the act of 1852, *supra*, §2994, *supra*, which casts the estate upon "the next of kin, in equal degree of consanguinity," upon the failure of a class, viz., uncles and aunts—and the descendants of such as are dead—which means descendants of deceased uncles and aunts where some of the class are still living, but has no application where the

whole class fails, as in the case at bar, for in such event, the estate is taken by the "next of kin in equal degree of consanguinity." In this instance the next of kin in equal degree of consanguinity are the first cousins, who take the entire estate to the exclusion of second and third cousins.

The policy of excluding the rule of inheritance by representation, or *per stirpes*, when the estate is taken by collateral kindred, is generally approved in other jurisdictions, and most of the states have statutes on the subject, some of which do not extend the rule as far as it is applied in Indiana. The decided weight of authority denies, or very greatly limits, the application of the principle where the estate is taken by collateral kindred, and the policy prevails generally of stopping the line of inheritance at the first, or some other designated class, of collateral kindred, who survive the ancestor and are capable of inheriting the estate. *Cox v. Cox*, *supra*; *Douglas v. Cameron* (1896), 47 Neb. 358, 66 N. W. 430; *Clary v. Watkins* (1902), 64 Neb. 386, 89 N. W. 1042; *Adee v. Campbell* (1878), 14 Hun 551; *Adee v. Campbell* (1879), 79 N. Y. 52; *In re Davenport* (1902), 172 N. Y. 454, 65 N. E. 275; *In re Oatley's Estate* (1914), 83 Misc. 655, 146 N. Y. Supp. 796; *Davis v. Vanderveer* (1872), 23 N. J. Eq. 558; *Schenck v. Vail* (1873), 24 N. J. Eq. 538, 542; *Van Cleve v. Van Fossen* (1889), 73 Mich. 342, 41 N. W. 258, 259; *Brenneman's Appeal* (1861), 40 Pa. St. 115; 27 Am. and Eng. Ency. Law (2d ed.) 322, 325 and cases cited in notes; 14 Cyc 52, 53 and cases cited.

Our conclusion on the question of inheritance makes it unnecessary to discuss the other questions presented and disposes of the whole case. The judgment is therefore reversed with instructions to the trial court to restate its conclusions of law on the

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finding of facts in accordance with this opinion, and to render judgment accordingly.

NOTE.—Reported in 108 N. E. 599. Rules of construction of statutes, see 12 Am. St. 826. On right of persons claiming through deceased relative to participate with those standing in equal degree of relationship with such relative in provision for “next of kin,” etc., see 28 L. R. A. (N. S.) 479. Construction together of contemporaneous statutes *in pari materia*, see 18 Ann. Cas. 424; Ann. Cas. 1915 A 186. See, also, under (1) 36 Cyc 1128; (2) 14 Cyc 16; (3) 14 Cyc 51.

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RUDOLPH HEGENER COMPANY v. FROST ET AL.

[No. 8,437. Filed March 2, 1915. Rehearing denied June 2, 1915. Transfer denied November 17, 1915.]

MECHANICS' LIENS.—*Materialmen*.—*Submaterialmen*.—*Right to Lien*.—One who contracted with an owner to furnish complete two flights of stairs according to specifications for the particular house to be constructed, but not to affix the stairs to the house, was not a contractor within the terms of the mechanic's lien statute, but a materialman only; hence a third person to whom he sublet the contract, and who talked with the owner about it, and was given specifications by him, and delivered the stairs on the owner's premises, stood in the position of a materialman furnishing material to a materialman and was not entitled to a lien.

From Lake Superior Court; *Virgil S. Reiter*, Judge.

Action by the Rudolph Hegener Company against Joseph Frost and another. From a judgment for defendants, the plaintiff appeals. *Affirmed*.

*J. Glenn Harris, Roy E. Ressler, Clarence Bretsch and Louis B. Ewbank*, for appellant.

*McCracken & Freer*, for appellees.

IBACH, J.—This was an action by a stair manufacturer and builder to enforce a mechanic's lien for the value of two flights of stairs manufactured after a special design expressly for the house which the owner, appellee Frost, was then building, of such size, shape and dimensions that they could not be

used in any other house, and so constructed that they fitted into said house without the use on them of any carpenter tools. These stairs were constructed at appellant's factory in Chicago, Illinois, after a personal interview of appellant's foreman with the owner of the house, at which time they went over the plans and specifications, and the foreman was given a copy of such plans and specifications, according to which the stairs were built, and delivered by appellant on the owner's premises, expressly for that house, and the owner set the stairs in place in the house, without any alteration whatever, merely attaching them to the building. Such stairs were manufactured and furnished under a contract for construction of stairs, for such house, entered into between appellant and George D. Clinton, who had an office in Gary, Indiana, and furnished interior trim work to contractors and builders, after the owner had "let the contract for the erection of said stairway, except the putting of the same into position, to Clinton." The court found that it was a case of a "materialman furnishing material to another materialman", and found against appellant for that reason.

The error assigned is the overruling of appellant's motion for new trial, in which it is specified that the decision of the court is not sustained by sufficient evidence, and is contrary to law. The facts disclosed by the evidence are substantially those recited above. Appellant's contention is that it is a case of a subcontractor who built an essential part of the house by the use of labor and materials, and furnished it on the premises for that particular improvement, under an employment by a contractor who had undertaken with the owner to furnish the necessary labor and materials and produce a completed portion of the house for use in its construc-



tion; and in any event that the materials were delivered by appellant directly to appellee owner on his premises, for use in his house, and were by him used therein. The case seems to have been decided exclusively on the authority of *Caulfield v. Polk* (1897), 17 Ind. App. 429, 437, 46 N. E. 932, which holds that "The statute makes no provision for a lien in favor of one who simply sells materials to another who is himself a materialman."

The first question for us in considering the present case is whether Clinton was a contractor or a materialman. Clinton's contract was to furnish the stairs, completed, according to certain specifications, for this particular house, but not to attach them to the house, or work on them after they were delivered on the premises. He contracted with appellant to build the stairs to fit these specifications, and in short, to do all that he, Clinton, contracted to do in regard to the stairs. In Phillips, *Mechanics' Liens* (3d ed.) §51, it is said, "There is, however, a palpable distinction between a contract to erect and a contract to furnish towards the erection, whether it be work or materials. One who contracts to put up a building, or one of its leading divisions, as its brick-work or its wood-work, is not a mere workman or a mere material-man. He is employed to construct or erect, and not merely to work. It is therefore clear that a lumber dealer, employed merely to furnish lumber, whether manufactured or not, is not a contractor for the erection of the building or any division of it. He is a materialman merely, or a workman, if he works up his lumber into frames, doors, etc., and is not employed to erect or put up the building or any of its primary divisions." In the case of *Foster Lumber Co. v. Sigma Chi Chapter House* (1912), 49 Ind. App. 528, 97 N. E. 801, Adams, J., of this court, said of one



who contracted to furnish all the stonework for a house, and to finish the stone ready for use, "nor do we think material ceases to be material when it is finished and ready for use." In the case of *Monroe v. Clark* (1910), 107 Me. 134, 77 Atl. 696, 30 L. R. A. (N. S.) 82, it is said that the distinction between the employes of contractors and the employes of materialmen is as to whether the work is done in the erection of the building, and that "where one contracts to furnish completed articles for a building, and is to have no part in the erection of the building, his employes have no lien for their labor in preparing and completing the articles. Their labor is in no proper sense performed in the erection of the building," and it was held that the employes of one who was to furnish cut stone for a building, according to certain specifications, were not entitled to liens as laborers. In the case of *Tracy v. Wetherell* (1896), 165 Mass. 113, 115, 42 N. E. 497, it was said, "The contract under which the petitioners were to 'furnish and deliver' certain articles of wood-work for a house 'all prepared,' in shapes like those in another house, even if it necessitated special manufacture and called for things not to be found in the market, which does not appear, would have been satisfied by a delivery of those articles by whomsoever prepared. However, likely it may have been that the petitioners would have to prepare the things themselves, the contract did not require them to do so. This being so, the contract was a contract for materials only, and not a contract for labor and materials." Other cases upholding the same theory are *Eisnor v. Dinand* (1896), 165 Mass. 116, 42 N. E. 498; *Arnold v. Budlong* (1877), 11 R. I. 561. Under these holdings, we think Clinton must be regarded as a materialman, and not a contractor. As a materialman, Clinton would have had a right to en-

force a mechanic's lien for the value of the stairs. Had his contract included the putting of the stairs in place and their attachment to the building, we believe that he could have been called a contractor, but that is not the case.

We think that appellant occupies the position merely of a materialman furnishing material to a materialman, and not of a subcontractor, or of a materialman furnishing materials to a contractor. We see no reason to depart from the holding in *Caulfield v. Polk*, *supra*, that a materialman furnishing material to another materialman has no right to a mechanic's lien, for we believe that holding supported both by reason and the weight of authority. See, *Hightower v. Bailey* (1900), 108 Ky. 198, 56 S. W. 147, 94 Am. St. 350, 49 L. R. A. 255; 27 Cyc 100 and cases cited; Phillips, *Mechanics' Liens* (3d ed.) §51. Judgment affirmed.

NOTE.—Reported in 108 N. E. 16. Lien of materialmen, see 79 Am. Dec. 268. On the right of a subcontractor to protection of statutes giving liens to "laborers," "mechanics," "workmen," and the like, see 30 L. R. A. (N. S.) 85. Necessity that materials for which mechanic's lien is claimed be incorporated in structure, see 13 Ann. Cas. 13; 19 Ann. Cas. 588; Ann. Cas. 1913 B 502. See, also, 27 Cyc 100.

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NATIONAL LIVE STOCK INSURANCE COMPANY v.  
ELLIOTT.

[No. 8,573. Filed May 7, 1915. Rehearing denied October 6, 1915.  
Transfer denied November 17, 1915.]

1. INSURANCE.—*Live Stock Insurance.—Expediting Death of Animal.—Liability.*—Where plaintiff's mare in the foaling of a colt was so badly torn and mangled that she suffered great pain and was in a dying condition, and there was no possibility of recovery, the act of the veterinary surgeon in expediting her death by a blow on the head did not relieve defendant from liability under a policy covering loss by death from foaling. p. 114.
2. INSURANCE.—*Live Stock Insurance.—Death of Animal.—Official Acts.—Liability.*—Defendant was liable for the death of a mare

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covered by a policy providing that no liability should attach for death caused by the authority or direction of an officer or person claiming to act under and by virtue of any law, where, on finding the mare to be suffering and in a dying condition beyond the possibility of recovery, the veterinary in charge, who was also an officer of the law, expedited her death by a blow on the head, in the absence of anything to show that he was acting in his official capacity rather than in the performance of his duty as a veterinary. p. 116.

3. **INSURANCE.—Live Stock Insurance.—Action on Policy.—Interrogation of Party Before Trial.—Conclusiveness of Answer.**—In an action on a policy of live stock insurance exempting the company from liability for death of an animal pursuant to official authority or direction, plaintiff's answer to an interrogatory propounded before trial, that the animal was killed by an officer of the law, was not conclusive and was subject to contradiction by evidence showing that the officer did not act in an official capacity and that what he did was merely to expedite the death of the animal whose condition was already beyond the possibility of recovery. p. 116.

4. **INSURANCE.—Live Stock Insurance.—Notice of Illness.**—Under a policy of live stock insurance requiring notice to the company in case of illness of the animal insured, the owner of the animal has a reasonable time within which to give such notice, and where the facts are disputed the question of what constitutes a reasonable time is for the jury; hence where plaintiff's mare in foaling was so badly torn and mangled that she was beyond the possibility of recovery and was suffering intensely, so that humane treatment required the immediate expediting of death, the court can not say that the failure to notify the company of the animal's illness was unreasonable. p. 116.

5. **INSURANCE.—Live Stock Insurance.—Defenses.—Waiver.**—Where a live stock insurance company, with knowledge of all the facts respecting the death of the animal insured, rejected the claim after proof of loss solely upon the ground that the animal had been killed by an officer of the law, it thereby waived all other grounds of defense, including the plaintiff's failure to give notice of the animal's illness. p. 117.

From Bartholomew Circuit Court; *Hugh Wickens*, Judge.

Action by Charles J. Elliott against the National Live Stock Insurance Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

*Mitchel S. Meyberg*, for appellant.

*Kohlmeyer & Sharpnack*, for appellee.

**SHEA, J.**—This was an action by appellee before a justice of the peace to recover against appellant on a policy of insurance in the sum of \$125, issued by appellant to indemnify appellee against loss by death of a certain mare, from foaling. Judgment was rendered against appellant by said justice, from which an appeal was taken to the Bartholomew Circuit Court. Appellee's complaint is predicated upon the theory that the animal insured died of foaling, and that the loss was one indemnified against by the contract or policy of insurance. Appellant denied this, and claimed the animal died from the effects of a blow upon its head with an ax. Appellant further denied that appellee had performed his part of the contract.

The cause was tried by jury. Verdict and judgment for appellee for \$128.70. The only error assigned is the action of the court in overruling the motion for a new trial. The causes assigned therefor are, (1) the verdict of the jury is not sustained by sufficient evidence, (2) the verdict of the jury is contrary to law.

In support of its contention appellant argues first that the mare insured did not die from foaling, but that death was caused by a blow on the head,

1. inflicted by the veterinary surgeon, who was in attendance. The veterinary surgeon testified that the animal was torn up in such condition that she could not get up, and in fact could not live; that there was no chance for her at all, and that she died from foaling. He described the condition of the animal in the following language: "Her intestines were on the ground and they were torn into. This colt's feet went through the intestines and there they laid in a bunch and she had flooded until she was very weak. We tried to get her up and could not. She was worn out. It was hot and she

was lying in the sun and was sweating; we could not get her up and there she laid. I did all I could do. The colt was deformed and dead, and had been dead for some time. Everything was out; her intestines were torn into. We could not do anything and we had to give it up. She was dying. \* \* \* she was dying from flooding. She was bleeding to death, and suffering great pain. She was sweating and in great misery there in the sun;" that he telephoned the company and wrote them what he did and all about it; that intestines can sometimes be fixed, but it could not have been done in this case. He tried to get the animal to stand because he wanted to do everything he could, but when he had exhausted every effort in his power, and found there was no possibility of the animal living, he hit her with an ax between the eyes to end her suffering; that she was in a dying condition anyway, and would not have lived longer than an hour or two. This evidence is undisputed. The animal was in a suffering, dying condition, and there was no possibility of recovery. Under such circumstances every instinct of humanity dictated that the veterinary surgeon and the owner of the animal should do exactly what they did, end the suffering. It is idle to say under such circumstances that the death was not caused from foaling insured against in the policy. The foaling brought about the dying, suffering condition. The act of the veterinary surgeon and owner was but humane, and to be commended rather than condemned, as the facts are here shown. This question has recently been decided by this court adversely to appellant's contention. *Live Stock Ins. Assn. v. Edgar* (1914), 56 Ind. App. 489, 105 N. E. 641.

It is further argued that the animal was killed by an officer of the law, and therefore there could

be no recovery, as the policy contains the following language: "This company will not be liable \* \* \* for the death of any animal which is caused by the authority or direction of any State or government officer, or other officer or of any person claiming to act under and by virtue of any law." Prior to the trial appellant propounded to appellee various interrogatories, among which was the following: "Q. Was this party (veterinary surgeon) an officer of the law, or any person claiming to act under the law? A. Yes." Upon the basis of this clause of the policy, and interrogatory, appellant contends there can be no recovery. There is no merit in this contention. It is not disclosed what official position the veterinary surgeon held, and it is clear that he was not acting in an official capacity when he performed the act complained of, but was rather performing his duty as a veterinary surgeon prompted by the instincts of humanity, in order that the pain and suffering might be relieved. It is argued that because appellee, in answer to an interrogatory, stated the animal was killed by an officer of the law, that such statements can not be contradicted by the evidence, and are conclusive. Repeated holdings of this court are to the contrary. *Travelers Ins. Co. v. Nitterhouse* (1894), 11 Ind. App. 155, 38 N. E. 1110; *Hodson v. Great Camp, etc.* (1911), 47 Ind. App. 113, 93 N. E. 861.

It is further insisted that there can be no recovery in this case because notice of the sickness of the animal was not given. We doubt whether foaling is such sickness as required notice under the terms of the policy, unless prolonged illness should result therefrom, which is not borne out by the facts here. In any case, appellee has reasonable time within which to give notice of

sickness. Where the facts are in dispute, what is a reasonable time is a question of fact for the jury. *Pickel v. Phoenix Ins. Co.* (1889), 119 Ind. 291, 21 N. E. 898; *Metropolitan Life Ins. Co v. Frankel* (1915), 58 Ind. App. 115, 103 N. E. 501; 2 Bacon, Ben. Soc. and Life Ins. §405. We can not say in this case that the failure to give notice of the animal's sickness under the circumstances was unreasonable.

In rejecting the claim after proof of loss, appellant did not rest its refusal to pay upon the ground of failure to give notice, but solely upon the

5. ground that the animal had been killed by an officer of the law. This was a waiver of any claim of defense upon other and different grounds. The evidence of the veterinary surgeon shows that appellant had knowledge of the facts respecting the death of the animal. In the absence of facts explaining or excusing the failure of appellant to make the claim of death by striking with an ax, that claim is waived, and the defense must rest upon the ground assigned. The principle is upheld in our own courts, as well as in many other jurisdictions. *Fort Wayne Ins. Co. v. Irwin* (1899), 23 Ind. App. 53, 54 N. E. 817; *Indiana, etc., Life Ins. Co. v. McGinnis* (1913), 180 Ind. 9, 15, 101 N. E. 289, 45 L. R. A. (N. S.) 192; *Western, etc., Pipe Line Co. v. Home Ins. Co.* (1891), 145 Pa. St. 346, 22 Atl. 665, 27 Am. St. 703; *Smith v. German Ins. Co.* (1895), 107 Mich. 270, 65 N. W. 236, 30 L. R. A. 368; *Douville v. Farmer's Mut. Fire Ins. Co.* (1897), 113 Mich. 158, 71 N. W. 517; *Home Life Ins. Co. v. Pierce* (1874), 75 Ill. 426; *Cahill v. Andes Ins. Co.* (1872) 5 Biss. 211, Fed. Cas. No. 2289.

The case of *Head v. National Live Stock Ins. Co.* (1914), decided by the court of civil appeals of Tennessee, on November 14, 1914, cited and relied on



by appellant, is easily distinguishable in its facts from the case at bar. In that case appellant's mule became lame on Thursday, and did not die until the following Monday. Plenty of time elapsed within which the owner could have notified the company of the condition of the animal. This was not done because the owner did not think the condition was serious. The court very properly held in this case that there was a failure to comply with the terms of the policy, which provided for notice forthwith by telephone or telegram, of any accident that might happen to the animal.

The case of *Tripp v. Northwestern Live Stock Ins. Co.* (1894), 91 Iowa 278, 59 N. W. 1, is likewise distinguishable, because the horse in that case was killed by the veterinary surgeon two hours before the policy expired, not because the animal was suffering pain, but because it was believed to be impossible for the animal to recover, so that the humane doctrine which we think is rightly invoked in the case at bar had no application to that case.

We find no reversible error in the record. Judgment affirmed.

NOTE.—Reported in 108 N. E. 784. On the questions coming under policy of animal insurance, see 44 L. R. A. (N. S.) 569; Ann. Cas. 1915 A 614. See, also, under (1) 25 Cyc 1520; (3) 16 Cyc 1045; (4) 25 Cyc 1519.

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## VANDALIA RAILROAD COMPANY v. YEAGER ET AL.

[No. 8,555. Filed November 18, 1915.]

1. WATERS AND WATERCOURSES.—*Obstruction of Surface Water.—Liability.*—A landowner without incurring liability therefor may in a proper manner erect at his boundary barriers to ward off surface water from his lands, but such rule does not extend to a case where a natural or prescriptive watercourse is obstructed or interfered with to the damage of another. p. 122.
2. RAILROADS.—*Construction.—Watercourses.*—The rules defining

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the liability of landowners with reference to obstructing the flow of water apply also to a railroad company in improving, using or protecting its right of way, and though a railroad is by statute authorized to construct its road across any stream of water or watercourse, its interference with the free use of the stream, or failure to restore it to substantially its former state, renders the company liable to respond in damages to any one injured thereby. p. 122.

3. RAILROADS.—*Obstruction of Watercourse.—Complaint.—Sufficiency.—Easement by Prescription.*—A complaint against a railroad company for damages for the obstruction of water flowing across defendant's right of way through plaintiffs' land, which did not disclose that plaintiffs or their predecessors caused the water to flow across the right of way under a claim of right to do so, necessarily failed to show the adverse exercise of such a right, and was therefore insufficient on the theory of an obstruction of a prescriptive watercourse. p. 123.

4. RAILROADS.—*Obstruction of Natural Watercourse.—“Stream of Water.”—“Watercourses.”—Pleading.*—A complaint against a railroad company for damages charging the obstruction of water flowing across defendant's right of way through the land of plaintiffs, which alleged in effect the existence of a course through which water had flowed without interruption for a number of years prior to the injuries complained of, and characterized the same as a “running stream of water” and also as a “natural watercourse,” by means of which the land of plaintiffs was drained, showed the obstruction of a natural watercourse; the distinction between a “stream of water” and a “watercourse” being shadowy and unsubstantial, while a “natural watercourse” is a channel cut by the force of its own running waters. p. 123.

5. RAILROADS.—*Obstruction of Natural Watercourse.—Evidence.—Liability.*—Where a railroad company constructed its track over the land of plaintiffs and across a natural watercourse running through such land, placing a culvert under the track sufficient to take care of the water without serious damage to the farm, which culvert was subsequently replaced by sewer pipe of capacity to carry the water except after heavy rains, and plaintiffs constructed underground tile drains under the track which alone carried the water of the stream except after heavy rains, when the water flowed down the line of the ancient channel to the sewer pipe, and, in so doing, recut the channel which plaintiffs had from time to time effaced by plowing and cultivating the land, and it was shown that eventually the railroad company constructed a sidetrack so as to obstruct the mouth of the sewer pipe and cause the land to be flooded, a finding that the company had obstructed a natural watercourse was warranted, since the construction of the tile drains did not change the character of the watercourse, though the only waters thereafter flowing therein were surface waters from rains, in view of the fact that all waters flowing within the limits of the

channel, though in part flood waters, were a part of the waters of the watercourse. pp. 125, 128.

6. **WATERS AND WATERCOURSES.—*Natural Watercourse.***—Where the face of the country is such as to collect in one body so large a quantity of water, after heavy rains and the melting of large quantities of snow, as to require an outlet to some common reservoir, and such water is regularly discharged through a well defined channel made by the force of the water, and which is the accustomed channel through which it flows, and has flowed from time immemorial, such channel is an ancient natural watercourse. p. 127.
7. **WATERS AND WATERCOURSES.—*Natural Watercourse.—Obstruction.—Liability.***—Though a lower proprietor has no right to so construct a dam as to throw the water back on the premises of the upper proprietor in time of ordinary freshets, he is not liable for damages occasioned by extraordinary floods, against which ordinary skill and foresight would not provide, though the backing of the water is increased by such dam. p. 129.
8. **RAILROADS.—*Obstructing Watercourses.—Measure of Damages.—Successive Actions.***—In an action against a railroad company for damages for obstructing a natural watercourse, on the theory of a continuing but temporary injury to plaintiff's land, the measure of damages, in the absence of allegations showing some special damages or a permanent injury, is the depreciation in the value of the use or the rental value of the land, and is limited to the period marked by the commencement of the action; but successive actions may be maintained for subsequent periods if the wrong and the injury continue, and where a supplemental complaint is filed recovery may be had to the time of its filing. p. 130.
9. **WATERS AND WATERCOURSES.—*Obstruction.—Continuing Temporary Injury.—Damages.—Review.***—An assessment of damages in the sum of \$900 for the obstruction of a natural watercourse so as to overflow the land of plaintiffs was excessive, and also erroneous on the ground of double damages, where the obstruction was a continuing temporary injury in existence one year prior to filing the complaint, and the sustaining of the judgment required the consideration of depreciation of the rental value for three entire years, plus three years' interest on the estimated investment in the lands flooded. p. 131.

From Superior Court of Marion County (83, 672); *Joseph Collier*, Judge.

Action by Louie Yeager and others against the Vandalia Railroad Company. From a judgment for plaintiffs, the defendant appeals. *Reversed.*

*Samuel O. Pickens, Owen Pickens and John G. Williams*, for appellant.

*W. S. Doan and J. C. Mathews, for appellees.*

CALDWELL, J.—Appellees brought this action to recover damages suffered by reason of appellant having constructed and maintained a sidetrack, the embankment of which obstructed the flow of water from appellees' farm. A trial resulted in a verdict for \$2,000, from which appellees remitted \$1,100, and judgment was rendered for the residue. The errors assigned are based on the overruling of the demurrer to the amended complaint, and on overruling the motion for a new trial. The points made under the latter assignment are the insufficiency of the evidence; that the verdict is contrary to law; an excessive recovery; and alleged error in giving instructions.

The substance of the amended complaint hereinafter referred to as the complaint is as follows: Appellees own an 86-acre tract of land in Marion County, used and cultivated by them as one farm for many years. The farm is crossed diagonally from northeast to southwest by appellant's right of way and track, so that twenty-eight acres of the farm are on the northwest side of the railroad. Prior to the grievances complained of, the 28-acre tract was drained through and by means of a running stream of water, which extended south and west intersecting appellant's railroad, where it crossed appellees' land. It is alleged that for more than twenty years, appellant and its predecessors maintained an outlet and crossing under its track for the water coming from the farm, which water ran along said stream, and under appellant's track through an outlet and way prepared for that purpose; that about eighteen months prior to the filing of the complaint, appellant negligently and without right obstructed the outlet by building a sidetrack and grade across

it, and thereby "entirely obstructed the natural flow of the water as the same flowed off plaintiff's land along said natural watercourse, as hereinbefore mentioned" and thereby dammed the water and caused the farm to be overflowed and flooded; that as a consequence, eight or ten acres of the twenty-eight acres are entirely under water; that by reason of the flooded condition of the land, it has become unproductive and untillable, and appellees have been, and are unable to cultivate it, and that certain described crops have been damaged and destroyed; that appellees a number of times requested appellant to remove the obstruction, but that it refused to do so; that appellees have been damaged in the sum of \$2,000, for which judgment is asked.

Appellant contends that the complaint discloses that in constructing and maintaining its embankment and sidetrack on its right of way, it

1. obstructed a mere surface water drain, rather than a natural or prescriptive watercourse, and that the complaint is therefore insufficient. If appellant is correct in its interpretation of the complaint, the demurrer thereto should have been sustained. By the decisions of the courts of appellate jurisdiction it has become a settled doctrine in this State, that a landowner without incurring liability therefor may in a proper manner erect at his boundary barriers to ward off surface water from his lands. This broad rule of nonliability however does not extend to a case where a natural or prescriptive watercourse is obstructed or in-

2. terfered with to the damage of another. The rules that define the liability of landowners in the matter under discussion apply also and likewise to a railroad company in improving, using or protecting its right of way. *Clay v. Pittsburgh, etc.,*

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*R. Co.* (1905), 164 Ind. 439, 73 N. E. 904; *New Jersey, etc., R. Co. v. Tutt* (1907), 168 Ind. 205, 80 N. E. 420; *Guynn v. Wabash, etc., Light Co.* (1914), 181 Ind. 486, 104 N. E. 849. By statutory provision, a railroad company is authorized to construct its road across any stream of water or watercourse, so as not to interfere with its free use, but is required to restore such stream or watercourse substantially to its former state, and any neglect or wilful failure to do so makes it liable to respond in damages to any one injured thereby. §5195 Burns 1914, Acts 1911 p. 136; *Cleveland, etc., R. Co. v. Wisheart* (1903), 161 Ind. 208, 67 N. E. 993; *Graham v. Chicago, etc., R. Co.* (1906), 39 Ind. App. 294, 77 N. E. 57, 1055.

We proceed to determine whether the complaint presents a case of the obstruction of either a prescriptive or a natural watercourse. The com-

3. plaint does not disclose that appellees or their predecessors caused the waters from their lands to flow across appellant's right of way under a claim of right to do so. It therefore fails to show the adverse exercise of such a right. These necessary elements of an easement by prescription are lacking, and the complaint is therefore insufficient on the theory of an obstruction of a prescriptive watercourse. *Mitchell v. Bain* (1895), 142 Ind. 604, 42 N. E. 230; *Cleveland, etc., R. Co. v. Huddleston* (1899), 21 Ind. App. 621, 52 N. E. 1008, 69 Am. St. 385; *Cleveland, etc., R. Co. v. Griswold* (1912), 51 Ind. App. 497, 97 N. E. 1030; *Gaskill v. Barnett* (1913), 52 Ind. App. 654, 101 N. E. 40.

On the subject of the nature of the watercourse which appellant obstructed, the only reasonable construction of which the complaint is sus-

4. ceptible is that it is thereby alleged in effect that for a number of years prior to the in-

juries complained of, a watercourse, in which water flowed without interruption, characterized by the complaint as a "running stream of water" and also as a "natural watercourse," traversed appellees 28-acre tract of farming land southward to and under appellant's railroad track, through an opening prepared for that purpose, and that by means of such watercourse, the lands traversed were drained. As used in some connections, "the legal distinction between the terms 'a stream of water' and 'a watercourse,' if any, is shadowy and unsubstantial." *New Jersey, etc., R. Co. v. Tutt, supra*. A stream of water is a current of water, a body of water having a continuous flow in one direction. 36 Cyc 1335. A watercourse is a channel cut through the turf by the erosion of running water, with well-defined banks and a bottom and through which water flows and has flowed immemorially, not necessarily all the time, but ordinarily and frequently for substantial periods each year. *New Jersey, etc., R. Co. v. Tutt, supra*. If a stream of water flows ordinarily and frequently in the same place through farming land, it must of necessity result that it will form for itself a channel with banks and a bottom, and if it flows without interruption, it must have a constant source of supply. Moreover, the complaint here designates the watercourse involved as a natural watercourse. If a natural watercourse, it has a channel cut by the force of its own running waters. Under authorities above cited, the complaint shows the obstruction of a natural watercourse. It follows that the court did not err in overruling the demurrer. See, also, *Ramsdale v. Foote* (1882), 55 Wis. 557, 13 N. W. 557 *Fisher v. Paff* (1899), 11 Pa. Super. Ct. 401; *Ward v. Ford* (1899), 58 S. C. 557, 36 S. E. 916.

In challenging the sufficiency of the evidence, ap-



pellant contends that it obstructed the flow of mere surface water, rather than the waters of a

5. watercourse. There was evidence to support the following facts: Appellant's railroad was built in 1867. At that time, a constantly flowing stream of water which arose at some point north entered on the lands now owned by appellees and traversed said lands southward in a permanent channel two or three feet deep and several feet wide. Appellant's predecessors recognized the existence of this stream by placing a culvert eight feet wide for its passage under the track. At periods of drouth the channel carried but little water. The stream was subject to overflow at times of freshets after rains, and under exceptional circumstances it became several rods wide. The culvert however accommodated the waters without serious damage to the adjacent lands. A number of years later, the railroad company removed the culvert, and placed in its stead a sixteen-inch sewer pipe, which proved to be sufficient to carry the water except after heavy rains, at which times the lands now owned by appellees were to some extent flooded. The landowner thereupon constructed two underground tile drains six and eight inches in diameter, from the south to the north side of the lands along the line of the stream, crossing under the railroad track near the sewer tile. The tile drains alone carried the water of the stream except after heavy rains at which times the surplus water ran down along the course of the stream and through the sewer pipe. Since the tile drains alone ordinarily carried the water, the landowner in farming plowed and cultivated the land across the channel, and thus filled it up. After heavy rains water flowed down the line of the ancient channel to the sewer pipe, and in so doing recut the channel, but at the next plow-

ing, it was again filled as before. In this manner, the stream was handled by appellees and their predecessors until May, 1910, when appellant built the sidetrack north of the main track, as described in the complaint and in so doing totally obstructed the mouth of the sewer pipe, by building the grade of the side track against it. As a consequence, appellees' lands north of the sidetrack soon became flooded and continued in that condition a large part of the time until the date of the trial. At times the water stood to the top of the grade of the sidetrack, and extended over fifteen to twenty acres of appellees' lands north of the track. Water flowed in the tile drains throughout the entire year, and they were overtaxed even at times of ordinary freshets.

Under these facts, appellant concedes that at the time of the building of the railroad in 1867, the stream was a natural watercourse within the meaning of that term as used in the law. Appellant contends, however, that the stream lost its identity as such by the act of the landowner in constructing the tile drains, and thus placing a part, and at times all of its running waters underground. It is argued in effect that since the tile drains were sufficient at times to carry the water, the overflow of the tiles was the result of rains or melting snow, and therefore mere surface water; that the sewer pipe therefore carried mere surface water, and that appellant as a consequence incurred no liability by obstructing its flow as indicated. If the situation here presented a natural watercourse, the construction of the tile drains along its course did not change its nature as such. *Walley v. Wiley* (1914), 56 Ind. App. 171, 104 N. E. 318; *Schwartz v. Nie* (1902), 29 Ind. App. 329, 64 N. E. 619; *Cleveland, etc., R. Co. v. Huddleston, supra*; *Wharton v. Stevens* (1891),

84 Iowa 107, 50 N. W. 562, 35 Am. St. 296, 15 L. R. A. 630; *Vannest v. Fleming* (1890), 79 Iowa 638, 44 N. W. 906, 18 Am. St. 387, 8 L. R. A. 277. It can not be successfully argued that only that part of the waters that flowed in the stream when it was at its lowest ebb constituted the exclusive waters of the watercourse, and that all other waters flowing in the channel as the result of rains were mere surface waters. Certainly all waters that flowed within the limits of the channel although in part flood waters were a part of the waters of the watercourse. Flood waters flowing without the ordinary channel are under some circumstances classed as a part of the stream rather than as surface waters. Thus it is recognized that waters overflowing the natural channel may flow down the course of the stream uniform in current with it, and at such regular intervals as to form what is known as a high-water channel, all the waters contained within it being classed as waters of the stream or watercourse, rather than as in part surface water. *New York, etc., R. Co. v. Hamlet Hay Co.* (1898), 149 Ind. 344, 47 N. E. 1060, 49 N. E. 269. See, also, *Fordham v. Northern Pac. R. Co.* (1904), 30 Mont. 421, 76 Pac. 1040, 104 Am. St. 729, 66 L. R. A. 556; *Cairo, etc., R. Co. v. Brevoort* (1894), 62 Fed. 129, 25 L. R. A. 527, and note; 40 Cyc 639.

An origin from rains and melting snow is by no means an infallible guide in determining that a certain flow of water is mere surface water

6. that may be dammed with impunity. The

Supreme Court states the following as the true rule: "If the face of the country is such as necessarily collects in one body so large a quantity of water, after heavy rains and the melting of large bodies of snow, as to require an outlet to some common reservoir, and if such water is regularly dis-

charged through a well-defined channel, which the force of the water has made for itself, and which is the accustomed channel through which it flows, and has flowed from time immemorial, such channel is an ancient natural watercourse." *Taylor v. Fickas* (1878), 64 Ind. 167, 175, 31 Am. Rep. 114. See, also, *Mitchell v. Bain, supra*; note to *Wharton v. Stevens, supra*; *Rait v. Furrow* (1906), 6 L. R. A. (N. S.) 157, note.

The jury was warranted in finding from the evidence that the capacity of the ancient channel was very much in excess of the two tile drains, and also

5. the existence of a high-water channel as a part of the watercourse. A channel and banks and bed are ordinarily classed as the surface indications of a natural watercourse. They are, however, but the indicia of a watercourse. The essential characteristics of a watercourse that give it recognition as such are substantial existence and unity, regularity and dependability of flow along a definite course so that if a stream traverses the land of adjoining proprietors, it may be identified and recognized as such. The usual marks of such a flow are channel banks and bed made by the action of the water. Under some circumstances, however, a stream is classed as a natural watercourse in the absence of a well-defined channel as that term is usually understood, as where the water through a part of its course spreads over a considerable breadth of land. See cases collected in *Case v. Hoffman* (1893), 84 Wis. 438, 54 N. W. 793, 36 Am. St. 937, 20 L. R. A. 40; *Harrington v. Demaris* (1904), 46 Or. 111, 77 Pac. 603, 82 Pac. 14, 1 L. R. A. (N. S.) 756, and note; 2 Farnham, Waters 1562; *Mitchell v. Bain, supra*; note to *Cairo, etc., R. Co. v. Brevoort, supra*; *Walley v. Wiley, supra*. Here originally there was, as indicated, a plain channel, with well-

defined banks. This channel, to an extent obliterated from time to time by human agency, was restored by the flowing waters at each freshet. Under such circumstances we believe that the stream remained a natural watercourse, even aside from the waters carried by the tile drains. Appellant obstructed the waters of such watercourse to the damage of appellees, and the evidence is therefore sufficient to sustain the verdict.

It being established that the stream here flowed in a natural watercourse, we would not be understood as holding that appellant is liable in

7. damages for obstructing the waters flowing down against the embankment of its sidetrack, regardless of the circumstances or the unusual or unexpected quantities of such water. The rule that governs in such cases is thus expressed by the Supreme Court: "The lower proprietor has no right to so construct his dam as, in times of ordinary freshets, to throw the water back on the premises of the proprietor above; and if he does so, he is responsible for the damages. But he is not responsible for damages occasioned by extraordinary floods, against which ordinary skill and foresight would not provide, though the backing of the waters may be increased by the dam." *Bristol Hydraulic Co. v. Boyer* (1879), 67 Ind. 236, 243. See, also, 40 Cyc 682 and cases; *Sloss-Sheffield Steel, etc., Co. v. Webb* (1913), 184 Ala. 452, 63 South 518; *Palmyra v. Waverly Woolen Co.* (1904), 99 Me. 134, 58 Atl. 674; *Sloss-Sheffield Steel, etc., Co. v. Wilson* (1913), 183 Ala. 411, 62 South 802; *Brierer v. Hurst* (1893), 155 Pa. St. 523, 26 Atl. 742. The syllabus, in the following language, indicates the decision in the case last cited: "In an action by an upper against a lower riparian owner for obstruct-

ing a stream, thereby causing an overflow of plaintiff's lands, defendants are liable if the obstruction is such as to impede the usual flow of water or that caused by the ordinary freshets to which such stream is liable."

We agree with appellant in its contention that the damages assessed remain excessive after the remittitur. We agree with appellees, however,

8. in their interpretation of the complaint that it proceeds on the theory of a continuing but temporary injury to the land. The court's instruction to the jury were on that theory. While the sidetrack here is perhaps a permanent structure, its embankment need not remain in such a condition as to continue to inflict an injury on appellees by flooding their lands. In such an action, in the absence of allegations showing a permanent injury to the land, or some special damages, the recovery is measured by the depreciation in the value of the use or the rental value of the land, and is limited to the period marked by the commencement of the action. Successive actions, however, may be maintained for subsequent periods if the wrong and the injury continue. *Baltimore, etc., R. Co. v. Quillen* (1904), 34 Ind. App. 330, 72 N. E. 661, 107 Am. St. 183; *Cleveland, etc., R. Co. v. King* (1900), 23 Ind. App. 573, 55 N. E. 875; *Louisville, etc., R. Co. v. Sparks* (1895), 12 Ind. App. 410, 40 N. E. 546; *Niagara Oil Co. v. Jackson* (1911), 48 Ind. App. 238, 91 N. E. 825; *Pickens v. Cole River Boom Co.* (1909), 66 W. Va. 10, 65 S. E. 865; 24 L. R. A. (N. S.) 354; 8 R. C. L. 483. Where a supplemental complaint, however, is filed, showing the continuation of the wrong, a recovery may be had to the time of its filing. *Niagara Oil Co. v. Jackson, supra*.

The sidetrack was built in May, 1910. The action was commenced in May, 1911, and tried in

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April, 1912. No supplemental complaint was  
9. filed. Appellees to sustain the judgment of  
\$900 are compelled to take into consideration  
depreciation of rental value for three entire years,  
viz., 1910, 1911 and 1912, aggregating \$360, and  
to this sum to add \$540, as interest on \$3,000 for  
three years, the latter sum being the estimated in-  
vestment in the lands flooded, the contention being  
that as appellees lost the use of such investment for  
the time estimated, the amount of such interest  
should be taken into consideration as an element of  
damages. It is apparent that there are two er-  
rors in appellees' calculation. It includes periods not  
allowable, and double damages are thereby claimed.

Certain other questions presented are not de-  
termined, as they may not arise on a new trial.  
For error in assessing the damages, the judgment is  
reversed, with instructions to sustain the motion for a  
new trial, with permission to file an amended com-  
plaint, and also a supplemental complaint if de-  
sired.

NOTE.—Reported in 110 N. E. 230. Liability of railroad company  
for interference with watercourses by construction of road on land ac-  
quired for right of way, see 19 Ann. Cas. 335. See, also, under (1)  
40 Cyc 568, 642; (2) 33 Cyc 326; 40 Cyc 573; (3) 40 Cyc 579; (4)  
40 Cyc 553, 579; (5) 33 Cyc 326; 40 Cyc 573, 574; (6) 40 Cyc 554;  
(7) 40 Cyc 682; (8) 33 Cyc 357, 373; 40 Cyc 581, 590.

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MAYWOOD STOCK FARM IMPORTING COMPANY v.  
PRATT

[No. 8,760. Filed November 18, 1915.]

1. EVIDENCE.—*Admissibility.*—*Opinions.*—Where a witness, in an  
action for fraud in the sale of a horse, had testified to facts showing  
that he possessed some information and skill in relation to the dis-  
ease with which the horse was alleged to be afflicted, not within  
the common knowledge and experience of ordinary men generally,  
the admission of his testimony to the effect that the horse had  
“summer sores” was not reversible error; and, even were the wit-



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ness not qualified as an expert, the admission of the testimony was not error, in view of the fact that it was based on observations of the witness and on facts within his personal knowledge related to the jury. p. 137.

2. **APPEAL.—Review.—Evidence.—Admissibility.**—In an action for fraud in the sale of a stallion, where a witness was asked if he could state why mares were not bred after a certain time, to which appellant objected on the ground that the question called for a conclusion and was hearsay, and the court, before the witness answered, cautioned him that he might state why they were not bred, but not what was said, the admission of the answer of the witness that the horse “was sore and they could not breed to him,” was not error, since, in the absence of any objection on the ground that he had not stated any facts or observations on which to base an opinion, or from which he might draw a conclusion, it must be assumed that the witness had stated some facts as a basis for the answer given. p. 138.
3. **APPEAL.—Review.—Objections to Evidence.—Waiver.**—Where the amount of the damages was not questioned by the motion for a new trial, questions presented on the admission and exclusion of evidence relating solely to the question of damages were waived. p. 139.
4. **FRAUD.—False Representations.—Instructions.**—Instructions in an action for fraud in the sale of a stallion afflicted with “summer sores,” stating that if the stallion was in fact afflicted at the time of its purchase by plaintiff, with summer sores which rendered it unsound at the time, and defendant, not knowing whether it was afflicted or unsound, represented to plaintiff for the purpose of inducing him to purchase, that such stallion was not so afflicted, or that it was sound, and such statement or statements were believed and relied upon by plaintiff, he was entitled, if they were untrue, to recover; and that if a party makes material representations to induce another to purchase what he offers for sale, and the purchaser relies upon and in good faith believes same without knowing the contrary, and thereon purchases the property, which is in fact defective and not as represented, by reason of which he is damaged, a liability arises against the party making the representations regardless of whether he at the time knew that they were false; correctly stated the law applicable to the issues and evidence of the case, regardless of the fact that the complaint alleged that defendant at the time of making the representations knew that they were false. pp. 139, 141.
5. **ACTION.—Pleading.—Averments.—Proof.**—A party may, in the same paragraph, aver more facts than are necessary to state a cause of action and recover on proof of such of the facts so alleged as constitute a cause of action, even though some of the facts averred are not proven, and, under such circumstances the case proven is within the issues and there is neither a change of theory nor variance. p. 141.
6. **APPEAL.—Review.—Instructions.**—In an action for fraud in the

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sale of a horse, an instruction that if appellant's agent who made the sale to appellee represented the horse to be sound, such statement "would imply that said agent knew that said horse at said time, and that he was speaking from his own knowledge", etc., was not indefinite or uncertain and did not invade the province of the jury, though omitting the words "was sound" or words of like import after the words "at said time", where the rest of the instruction made its meaning clear, and, when considered with the other instructions, substantially stated the law correctly. p. 141.

7. **FRAUD.—False Representations.—Liability.**—Where one makes an unqualified statement of a fact as of his own knowledge and induces another to act upon it, and the fact does not exist, the law will impute to him a fraudulent purpose. p. 142.
8. **APPEAL.—Review.—Refusal of Peremptory Instruction.**—In an action for fraud in the sale of a horse the court properly refused to direct a verdict for defendant, in view of the admission of defendant's agent that he made the statement attributed to him without personal knowledge of its truth, and of other evidence of similar import. p. 143.
9. **APPEAL.—Review.—Refusal of Instructions.**—In an action for fraud in the sale of a horse, the refusal of an instruction to the effect that a mere expression of opinion does not amount to a representation was not error, where the court stated in another instruction that a representation to be fraudulent must not be a mere expression of opinion or relate to facts "open to plaintiff as well as to defendant." p. 143.
10. **APPEAL.—Review.—Refusal of Instructions.**—In an action for fraud in the sale of a horse, where there was evidence to show that the one who made the alleged false representations was in the employ of defendant and had authority to make the sale, and the representations related to matters peculiarly within the knowledge of defendant and its agent, and of which the plaintiff could not know and concerning which he made inquiry, the court properly refused an instruction requested by defendant on the theory that a purchaser has no right to rely upon representations where he has reasonable opportunity of examining the property and judging for himself as to its qualities. p. 144.
11. **APPEAL.—Review.—Refusal of Instructions.**—There is no error in the refusal of instructions where those given fully and correctly state the law applicable to the issues and facts of the case. p. 145.

From Hamilton Circuit Court; *Joseph A. Roberts*, Special Judge.

Action by Horace A. Pratt against the Maywood Stock Farm Importing Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

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*Joseph B. Kealing, Martin M. Hugg, Ralph Kane and Thomas Kane*, for appellant.

*Tindall & Tindall, Gentry & Cloe and Arthur C. Van Duyn*, for appellee.

FELT, J.—Appellee brought this suit against appellant in the Marion Circuit Court to recover damages for fraud in the sale of a stallion. After the issues were formed, on motion of appellee, the cause was venued to the Hamilton Circuit Court where a trial by jury resulted in a verdict for appellee for \$1,900. From a judgment rendered thereon appellant appealed to this court and has assigned as error the overruling of its motion for a new trial.

The complaint alleges in substance that appellant is a corporation organized under the laws of this State and is engaged in the business of importing and selling draft stallions to be used for breeding purposes; that in February, 1911, appellee visited appellant's stock farm and stated to it that he was desirous of purchasing a good draft stallion for breeding purposes; that appellant exhibited to him a large black stallion, named "Hector," and for the purpose of cheating and defrauding appellee and inducing him to purchase the stallion falsely and fraudulently represented to appellee that the horse was an excellent stallion for breeding purposes, and was sound in every way and was worth the sum of \$3,000 for breeding purposes and then and there offered to sell him to appellee for that sum; that at the time the horse was afflicted with a disease commonly called "summer sores," which disease was indicated by a chafed, inflamed and scarred appearance about the hocks of the stallion; that appellee was at the time wholly ignorant of the nature, character, appearance, symptoms and existence of such disease in horses, which fact appellant well knew at

the time; that appellee did at the time observe the chafed, inflamed and scarred appearance about the hocks of the horse and for the purpose of being informed as to the cause and nature of the same, asked appellant what caused such condition, whereupon appellant, for the purpose, and with the intent to deceive, cheat and defraud appellee, falsely stated that said stallion had injured its legs and hocks in contact with some part of the stall thereby rubbing and chafing the same and thereby causing the injured condition about which appellee inquired; that the same was of no consequence or importance and the injuries would be entirely well within a few days and that the same would in no way injuriously interfere with or affect the value or usefulness of said stallion; that for the purpose of cheating and defrauding appellee, appellant also stated to his agent, one Joshua J. Pratt, his father, that said sores were injuries received in the stall and that the same were of no consequence and would be well within a few days and that said stallion was sound in every way; that appellee and his said agent were wholly ignorant of the falsity of said statements and representations and appellee relied upon and believed said false explanation as to the sores and the soundness of the stallion, and so believing and relying, did purchase the stallion from appellant and in payment therefor executed to it his two promissory notes calling for \$1,500 each, dated March 1, 1911, and due respectively in one and two years from date; that appellant delivered the horse to appellee at the city of Greenfield, Indiana, at which time and place for the purpose of inducing him to accept the stallion, the defendant again, prior to such acceptance, falsely represented to appellee's said agent, that the sores upon and about the hocks of the stallion were injuries received in the stall and that they would be

well within a few days and that the stallion was sound in every way; that appellee and his said agent believed and relied upon the false statements and were ignorant of the falsity thereof, and so relying, did accept the stallion; that at the time said false representations were made, the stallion was afflicted with summer sores which rendered him unsound and unfit for breeding purposes; that appellant knew at the time the false representations were made by it to appellee that the same were false and fraudulent representations, and that the stallion was at the time afflicted with summer sores and was unsound; that the false and fraudulent representations were then and there made by appellant to appellee and his agent with intent on the part of appellant to cheat, deceive and defraud appellee and for the purpose of securing from him said two notes; that said disease was and is of such a character that shortly after the delivery of the stallion, the sores began to discharge serum and suppurate and appeared in four several places upon the stallion; that as the weather grew warmer, the sores continued to spread, grew larger, more aggravated, and continued to slough away, and emitted a foul odor and caused the horse to become unsightly and very lame, and rendered him wholly worthless for breeding purposes; that the disease is one of the blood and is transmissible to and inheritable by colts begotten by a stallion afflicted therewith; that appellee is and will be unable to procure the owners of mares to breed the same to said stallion because of such unsound and diseased condition, whereby the stallion is wholly useless and without value to appellee; it is also alleged that appellant transferred and indorsed the notes given by appellee, before the same came due, for a valuable consideration for the purpose of more effectually de-

frauding appellee. That appellee offered to return the stallion to appellant but it refused to receive him.

In its motion for a new trial appellant sets out fifty-nine specifications but we consider only those presented by the briefs.

Over appellant's objection that the witness had not shown himself to be an expert and was not qualified to express an opinion on "summer  
1. sores", William F. Thomas was permitted to testify in substance that sores he observed on the horse in controversy were "summer sores". The witness had previously testified that he was a horseman and had handled a good many horses; that he had bought and sold some and had raised a good many draft horses; that he had seen a good many horses with summer sores; that he was familiar enough with such sores to know them when he saw them; that one of his neighbors had a horse that was so afflicted and his attention had been called to several draft horses that had summer sores; that he observed the sores; that he had observed the scars occasioned by summer sores before he observed this particular horse; that he believed he could tell from his own judgment whether it was a summer sore or caused by something else. The witness showed that he possessed some information and skill in relation to the subject under investigation, not within the common knowledge and experience of ordinary men generally, and it was not therefore reversible error for the trial court to permit him to testify as he did. *Archer v. Ostemeier* (1914), 56 Ind. App. 385, 393, 105 N. E. 522, and cases cited; *Louisville, etc., R. Co. v. Donnegan* (1887), 111 Ind. 179, 191, 12 N. E. 151. Furthermore, the testimony was based on observations of the witness and on facts within his personal knowledge, related to the jury. Where this

is true and the witness has thereby shown any basis for the inference or opinion stated, it is not error to receive such testimony though the witness is not an expert on the subject under investigation. The evidence is thereby rendered competent and its weight is to be determined by the jury, or court, trying the case. *Horace F. Wood Transfer Co. v. Shelton* (1913), 180 Ind. 273, 278, 101 N. E. 718; *Archer v. Oste-meier, supra*, and cases cited.

It is next insisted that the court erred in overruling appellant's objection to a question asked one of appellee's witnesses as follows: "Q. Can  
2. you state to the jury why mares were not bred after that time?" The objection was that the question called for a conclusion and was hearsay. Before the witness answered the question the court stated that he might answer why they did not breed, state the cause, but not what was said. The witness then answered: "Why he was sore and they could not breed to him." Giving appellant the benefit of the objections made to the question and treating the statement of the court as an admonition to the witness not to enlarge upon or misinterpret the meaning of the question, we proceed to determine the competency of the evidence. Literally construed the question could be answered by yes or no, but ascribing to it a meaning that called for an opinion or conclusion of the witness, there is no objection that the witness had not stated any facts or observations on which to base an opinion, or from which he might draw a conclusion, and we therefore consider the question upon the hypothesis that the witness had stated some facts as a basis for the answer given to the question. Furthermore, the answer clearly indicates that such was the case. Viewed in this light it was not error to permit the witness to answer the question. 5 Ency. Evidence



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651 *et seq*; *Louisville, etc., R. Co. v. Donnegan, supra*, 190, 191; *Carthage Turnpike Co. v. Andrews* (1885), 102 Ind. 138, 142, 1 N. E. 364, 52 Am. Rep. 653; *Goodwin v. State* (1884), 96 Ind. 550, 558; *Louisville, etc., R. Co. v. Miller* (1895), 141 Ind. 533, 554, 37 N. E. 343.

Several questions are discussed in regard to the admission and exclusion of evidence which relate only to the question of damages. The amount

3. of damages is not questioned by the motion for a new trial, and the errors, if any, relating thereto are thereby waived. *Peabody-Alwert Coal Co. v. Yandell* (1913), 179 Ind. 222, 229, 100 N. E. 758; *Pittsburgh, etc., R. Co. v. Macy* (1915), 59 Ind. App. 125, 107 N. E. 486, and cases cited.

Appellant objected to the giving of instructions Nos. 2 and 8 requested by appellee which are as follows: (2) "If the stallion in question was in fact afflicted with summer sores at the time

4. of its purchase by the plaintiff, although such disease was in its incipient or dormant stage at that time, which rendered said stallion unsound at that time, and that the defendant company, not knowing whether said stallion was afflicted with summer sores or whether it was unsound, by its agent represented to the plaintiff for the purpose of inducing him to purchase said stallion, that it was not afflicted with summer sores, or that it was sound, which statement or statements the plaintiff believed and relied upon, and so relying purchased said stallion and that said statements turned out to be untrue, if they were untrue, then the plaintiff would be entitled to recover in this case." (8) "If a party, for the purpose of inducing another party to purchase property, makes material representations concerning the soundness of property, which representations the other party re-

lies upon and believes in good faith without knowing the contrary, and thereon purchases the property, which turns out to be defective, and not as represented, by reason of which the purchaser is damaged, the party making such representations will be liable to the injured party in damages as for fraud, without regard as to whether the party making such representations knew at the time he was making them that they were false." It is urged against these instructions that they omit (1) the element of fraud on which appellee's action is based, (2) the element of appellant's knowledge of the falsity of the alleged statements relied upon by appellee and (3) appellant's knowledge that appellee was ignorant of the nature and character of summer sores. Also that the complaint proceeds on the theory that the alleged fraudulent statements were known to appellant to be false and the instructions go outside the issues and authorize a recovery by proof that such statements were in fact made without showing that appellant at the time knew they were false. Where a party assumes to know and makes unqualified statements of material facts susceptible of knowledge, to induce another to act, if the statements are false, and are relied upon by another to his injury, it amounts to a fraud which renders the party making them liable therefor to such injured party, and it is no defense that he believed the statements so made to be true or that he did not in fact know they were false. *Kirkpatrick v. Reeves* (1889), 121 Ind. 280, 282, 22 N. E. 139; *New v. Jackson* (1912), 50 Ind. App. 120, 124, 95 N. E. 328; *Wheatcraft v. Myers* (1914), 57 Ind. App. 371, 377, 107 N. E. 81; *Anderson v. Evansville Brew. Assn.* (1912), 49 Ind. App. 403, 407, 97 N. E. 445. The theory of appellee's complaint is that of a fraudulent sale of the horse. If the alleged false

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statements were in fact made by appellant's agent who sold the horse to appellee, to induce him to make the purchase, and he relied thereon, and, without knowledge of their falsity, purchased the horse which was diseased and not as represented, and he was thereby damaged, it was a fraudulent sale regardless of whether the person who made such representations knew them to be false, or knew or did not know, that appellee was ignorant of the nature and character of the disease with which the horse was afflicted. A party may, in the same paragraph

aver more facts than are necessary to state a

5. cause of action and recover on proof of such of the facts so alleged as constitute a cause of action, even though some of the facts averred be not proven. Where this is true the case proven is within the issues, the theory is not changed and there is no variance. *Pittsburgh, etc., R. Co. v. Errington* (1915), 59 Ind. App. 371, 108 N. E. 133; *Rock Oil Co. v. Brumbaugh* (1915) 59 Ind. App. 640, 108 N. E. 260; *National, etc., Vehicle Co. v. Kellum* (1916), 184 Ind. —, 109 N. E. 196; *Title Guaranty, etc., Co. v. State, ex rel.* (1916), 61 Ind. App. —, 109 N. E. 237, 244; *Louisville, etc., Traction Co. v. Lottich* (1915), 59 Ind. App. 426, 106 N. E. 903.

The instructions above set out are substantially correct statements of the law applicable to

4. the issues and evidence of the case, and the court therefore did not err in giving them.

Objection is also made to instruction No. 7 given by the court, on the ground that it invades the province of the jury on the question of fraud and

6. that it is indefinite and uncertain as to what appellant's agent knew in regard to the horse at the time of sale. The instruction in substance told the jury that if appellant's agent who made the sale to appellee represented the horse to be sound,

such statement "would imply that said agent knew that said horse at said time, and that he was speaking from his own knowledge, and the plaintiff would have the right to rely on said statement if made, and if the plaintiff was induced to purchase said horse on account of said statement, if made, and if said horse was not at said time sound, but was unsound, and plaintiff relied on such statement, if made, and purchased said horse, relying thereon, and was damaged thereby, then in such event you should find for the plaintiff in such amount as he has been damaged, if any, as shown by the evidence in this cause." The instruction conveys the idea that if the agent represented the horse to be sound, such statement would imply that he knew the horse at said time was sound, but the words "was sound" or words of like import, seem to be omitted after the words "at said time". However the rest of the instruction makes the meaning clear and no harm could have resulted to appellant since the instruction as a whole when considered in connection with the other instructions given, substantially states the law correctly as applied to the issues and facts of the case. Furthermore in its brief, appellant says "There is evidently a clerical error in transcribing this instruction." *Staser v. Hogan* (1889), 120 Ind. 207, 225, 226, 21 N. E. 911, 22 N. E. 990. In *Kirkpatrick v. Reeves, supra*, 282 the court said: "A defendant who makes a statement of his own

7. knowledge can not escape liability upon the ground that he acted upon trustworthy information. An unqualified statement that a fact exists, made for the purpose of inducing another to act upon it, implies that the person who makes it, knows it to exist, and speaks from his own knowledge. If the fact does not exist, and the defendant states of his own knowledge that it does, and in-

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duces another to act upon his statement, the law will impute to him a fraudulent purpose." See, also, *Beck v. Goar* (1913), 180 Ind. 81, 85, 100 N. E. 1; *Wheatcraft v. Myers, supra*; *New v. Jackson, supra*.

Appellant tendered a peremptory instruction for a verdict in its favor and asserts that the court erred in refusing to give it. Appellant's agent who

8. made the sale, while testifying as a witness in the case, admitted that he stated to appellee that the horse was sound and that the scratches or sores on his limbs were caused by rubbing against timbers in the stall; that he said they did not amount to anything, that the horse was as sound as a dollar and did not have summer sores. On cross-examination the same witness admitted that he made this statement, without personal knowledge of its truth and that he was not present when the "scratch" was received and did not see it until three to five days later. In view of this and much other evidence of the same import, the court properly refused to give the peremptory instruction.

Appellant also complains of the refusal of the court to give instruction No. 2 tendered by it to the effect "that a mere expression of opinion by

9. one of the parties to a contract does not amount to a representation." The instruction states the law correctly but the court did not err in refusing to give it for the reason that by instruction No. 16 given at the request of appellant, the jury was told, among other things, that a statement or representation to be fraudulent must not be a mere expression of opinion or relate to facts "open to the plaintiff as well as to the defendant."

Complaint is also made of the refusal of the court to give instruction No. 6 which is as follows: "Any defect in the horse which was purchased by the

plaintiff from the defendant and which  
10. was open to observation and which was  
observed by the plaintiff before he purchased  
the horse, should have been examined and investigated by him before he purchased said horse, and if after observing said defect, he or his agents inquired of W. B. Mount, acting for the defendant, as to the nature of this defect, then I instruct you that anything that was said by said Mount to the plaintiff or his agent, concerning the same was a mere expression of opinion on the part of said Mount and would not be sufficient to constitute the basis of fraud in this action.” Appellant contends that “a purchaser has no right to rely upon the representations of the vendor as to the quality of the property where he has reasonable opportunity of examining the property and judging for himself as to its qualities.” There is evidence tending to prove that Mount was in the employment of appellant and had authority to make the sale. As such agent he represented appellant and it is bound by his statements of alleged facts made to induce appellee to make the purchase. The statements made related to matters peculiarly within the knowledge of appellant and its agent and did not pertain to matters so open and apparent as to place the parties on the same footing in respect to the representation of facts made by the one, and relied upon by the other party to the transaction. As to the cause, nature and character of the scratches or scars on the horse’s limbs, appellee was at the time ignorant. He could not then have known for himself, the facts relating thereto, and the evidence discloses that he sought information from appellant’s agent who made the sale and that he assumed to know and state the facts, which, if true as stated, would not have materially affected the value of the horse, or indicated

any disease of a serious character. The rule of *caveat emptor*, which appellant sought to place before the jury by this instruction was not applicable. As applied to the issues and facts of this case the instruction is objectionable and was properly refused. *Beck v. Goar, supra*; *Judy v. Jester* (1913), 53 Ind. App. 74, 86, 100 N. E. 15; *Ohlwine v. Pfaffman* (1913), 52 Ind. App. 357, 362, 364, 100 N. E. 777.

Complaint is also made of the giving of other instructions and of the refusal to give others tendered by appellant. Those refused, as far as correct statements of the law applicable to the case, were covered by others which were given. The instructions given, when considered as a whole, fairly and fully state the law applicable to the issues and facts of the case.

Appellant's contentions are mainly based on views of the law, which if ever applicable to such a case as is disclosed by the record, are not now sustained by the decisions of this court and our Supreme Court.

The case seems to have been fairly and impartially tried on the merits and substantial justice seems to have been done between the parties. The record discloses no intervening error prejudicial to appellant which would warrant a reversal. *Driscoll v. Penrod* (1911), 176 Ind. 19, 25, 95 N. E. 313. Judgment affirmed.

NOTE.—Reported in 110 N. E. 243. Effect of fraudulent concealment by vendor, see 15 Am. Dec. 106. On statements made without knowledge of falsity as ground for action for fraud, see 18 L. R. A. (N. S.) 379. See, also, under (1) 17 Cyc 60, 66; (2) 3 Cyc 300; (3) 3 C. J. 988; 29 Cyc 750; (4) 20 Cyc 127, 128; (5) 31 Cyc 701; (6) 38 Cyc 1598, 1599, 1778; (7) 20 Cyc 27; (8) 38 Cyc 1567; (9, 11) 38 Cyc 1711; (10) 38 Cyc 1617.



**SHEDD ET AL. v. AMERICAN MAIZE PRODUCTS COMPANY.**

[No. 8,372. Filed April 16, 1915. Rehearing denied June 24, 1915.  
Transfer denied November 19, 1915.]

1. **EASEMENTS.—Establishment and Protection.—Injunctive Relief.—Complaint.**—An indefinite easement or right of way which is not specifically located and described can not be established and protected and described; hence a complaint to enjoin encroachments upon or interference with an easement or right of way, which does not furnish the means or data for entering a definite decree, including a definite description as to dimensions and location, is insufficient. p. 154.
2. **EASEMENTS.—Location.—Persons Entitled to Locate Way.**—When an unlocated right of way is granted, or reserved, the owner of the servient estate may, in the first instance, designate a reasonable way, and if he fails to do so, when requested, the owner of the dominant estate may designate it. p. 154.
3. **EASEMENTS.—Location.—Selection by Owner of Dominant Estate.**—When the owner of the dominant estate or easement designates the location of the easement, he is required to select a route that is reasonable as to both parties in view of all the circumstances and that will not unreasonably interfere with the grantor, or owner of the servient estate, in the enjoyment of his property. p. 155.
4. **EASEMENTS.—Location.—Change of Location.**—When an easement or right of way has once been selected and located, it can not be changed by either party without the consent of the other. p. 155.
5. **EASEMENTS.—Interference.—Suit for Injunctive Relief.—Complaint.**—A complaint to enjoin defendants from interfering with the construction of a pipe line across defendants' land pursuant to the grant of an easement for same so as to connect plaintiff's premises with a lake, was insufficient, where it did not describe the real estate over which the easement was granted, and did not allege that the way over which the pipe line was to be extended into the lake had been located by any one, or that plaintiff had requested defendants to select the location and that they had failed and refused to do so, or that they had selected an unreasonable location, or that plaintiff had itself chosen the route. p. 155.
6. **NAVIGABLE WATERS.—Riparian Rights.—Right of Owner of Easement.**—An easement in land bordering on navigable waters carries such riparian rights in the submerged lands between the shore and the navigable portion of such body of water as are appropriate and necessary to give effect to the easement. p. 156.
7. **EASEMENTS.—Location.—Riparian Rights.**—Where defendants granted to plaintiff an easement for a pipe line through the land of defendants and into a lake on which such land fronted, and plaintiff had constructed the pipe line to a point near the shore of the

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lake, the location of the pipe line from that point into the lake was governed by the rules for the location of any easement granted, and the general rule for the determination of that portion of submerged lands over which riparian rights may be asserted, as between adjoining property owners, by extending lines from the water's edge at right angles to the prevailing shore line was inapplicable. p. 156.

8. **EASEMENTS.—Location.—Selection of Route.**—Under a grant of an easement for a pipe line across defendants' land and into a lake the interested parties could make any reasonable location of the easement on the property over which it extended, so long as they did not encroach upon or interfere with other property. p. 158.
9. **PLEADING.—Demurrer.—Scope of Inquiry.**—A pleading tested by a demurrer must stand or fall by its own averments alone, though the omission from a complaint may be cured or rendered harmless by an admission of the adverse party in his answer. p. 158.
- 10.—**APPEAL.—Exceptions to Conclusions of Law.—Admissions.—Sufficiency of Complaint.**—While an exception to conclusions of law admits for the purpose of the exception that the facts within the issues have been fully and correctly found, it does not always render a consideration of the complaint unnecessary, and it is only where the facts are fully and correctly found within the issues that an exception to the conclusions of law presents the same question as a demurrer to the complaint for want of facts. p. 159.
11. **APPEAL.—Review.—Amendments Regarded Made.**—Where a complaint to enjoin interference with an easement for a pipe line over the land of defendants and into a lake failed to describe the shape, dimensions or position of the easement, or a request by plaintiff for the location of the way and a refusal by defendants to grant it, and defendants by both their answer and cross-complaint alleged ownership of the real estate between the lake shore and plaintiff's premises, specifically describing same, and further alleged that defendants indicated and pointed out the site, place and location for the proposed easement and right of way for such pipe line, that the same was in a convenient place, extending in a straight line from plaintiff's plant in a northerly direction to the lake, at a point and position west and westerly from certain piers, docks and harbor, that the location pointed out was reasonable, and that plaintiff had no rights at the place where it was attempting to construct its line, etc., and it appears that the question of the location of the easement was tried on evidence introduced by both parties without objection, and that the issue was fully tried and determined, the defects in the complaint, being such as could have been amended at any time under §405 Burns 1914, §396 R. S. 1881, will be deemed, under §700 Burns 1914, §658 R. S. 1881, to have been amended so as to preclude a reversal. p. 160.
12. **TRIAL.—Findings.—Sufficiency.**—Findings can not be aided by the conclusions of law, and to warrant a recovery by plaintiff

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every fact material to the cause must be found and stated, or must necessarily and clearly arise by inference from the facts found and stated. p. 163.

13. TRIAL.—*Findings.—Failure to Find Material Fact.*—The failure to find a material fact is the equivalent of a finding against the party upon whom rests the burden of proving such fact. p. 163.
14. EASEMENTS.—*Deed.—Variation by Parol.—Findings.*—While a deed granting an easement, like other written contracts, is the repository of the entire agreement, and, in the absence of fraud, can not be varied by parol evidence, the actual consideration may be shown by parol to have been different from that expressed in the deed; hence in an action to enjoin interference with plaintiff's easement for a pipe line over the land of defendants, where the deed did not definitely locate the line of the easement, findings on parol evidence showing that grantor pointed out the way for the pipe line as an inducement to the purchase of the land to which the easement was appurtenant, and that this entered into the consideration for the purchase, were not objectionable as being outside the issues or as tending to vary the terms of the deed. p. 172.
15. EASEMENTS.—*Interference.—Suit for Injunctive Relief.—Findings.*—In a suit to enjoin interference with the construction of a pipe line across defendants' land and into a lake pursuant to the grant of an easement therefor, findings showing that during the negotiations for the sale to plaintiff of the land to which the easement was appurtenant defendants pointed out the line of the proposed easement, and again pointed it out after the sale was consummated, in each instance locating it east of a certain pier, and that plaintiff in extending the pipe line from a point where prior work of construction had ceased changed to a more easterly course than that indicated by extending the line in the direction pursued in such prior construction, so as to extend into the lake east of the pier, instead of west thereof as would otherwise have been the case, do not show that the course of the easement was changed from the line originally pointed out, nor are findings showing that plaintiff did not demand or request defendants to locate the remaining portion of the easement either before or after entering into the contract for such extension, in conflict therewith in the absence of a finding that there was an agreement to change the location as originally pointed out; and hence such findings supported the conclusions of law in favor of plaintiff. p. 174.
16. EASEMENTS.—*Suit to Enjoin Interference.—Defenses.—Creation of Nuisance.*—Where plaintiff sought to enjoin interference with the laying of a pipe line across the land of defendants and into a lake pursuant to the grant of an easement for such purpose, the relief sought could not be denied on the ground that the findings showed that the establishment of such pipe line would be a nuisance by reason of the pollution of water by the outfall discharged therefrom, where it appeared from other findings that defendant had selected

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the location for such easement, and that for two years prior to the alleged interference the discharge from plaintiff's partially constructed pipe line had polluted the water, of which fact defendants had knowledge and of which they had made neither complaint nor objection, and in the absence of a showing that the completion of such pipe line would in any way increase the pollution. p. 176.

17. EASEMENTS.—*Interference.—Suit for Injunctive Relief.—Parties.*

—A decree enjoining defendants from interfering with the construction of a pipe line across their land, pursuant to the grant of an easement therefor, so as to connect plaintiff's premises with a lake at a point in a harbor maintained at the mouth of a stream emptying therein, was not contrary to law on the ground that third persons claiming an interest in such harbor had not been permitted to intervene, since, in view of findings showing that the interests of such third persons consisted merely in a right equal with that of defendants to dredge the harbor and make it suitable for general use, that the same had not been made suitable for lake vessels, that plaintiff's pipes had been laid below the bed of such harbor and could be lowered by defendants at any time at a small cost to be borne by them, and from which it does not appear that the pipes will ever become an obstruction or interfere with any right of such third persons, the latter were not necessary parties to the suit. p. 179.

18. INJUNCTION.—*Right to Relief.—Remedy at Law.*—A party is not necessarily precluded from injunctive relief by the fact that he has a remedy at law, since the court may grant such relief where it appears that the legal remedy is not as prompt, practical, efficient and adequate as that afforded by equity. p. 182.

From Lake Superior Court; *Charles W. Hanley*  
Special Judge.

Action by the American Maize Products Company against Charles B. Shedd and another. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

*William J. Whinery, Harry S. Mecartney and Fred Barnett*, for appellants.

*Peter Crumpacker, F. C. Crumpacker and C. B. Tinkham*, for appellee.

FELT, J.—On September 29, 1909, appellee, American Maize Products Company filed its verified complaint asking the issuance of a temporary restraining order and that upon final hearing it be made permanent, enjoining appellants from interfering with the construction of certain pipe lines

from appellee's factory over the land of appellants, Charles B. and Edward A. Shedd, (hereinafter referred to as "the Shedds") and into Lake Michigan, by extending the pipe line from said land, in and through what is known as Wolf River harbor or outlet, and thence into Lake Michigan. Appellee asserts the right so to do by virtue of a certain grant from the Shedds, the particulars of which will more fully appear in this opinion.

The complaint is in one paragraph and alleges in substance that appellee is a corporation and owns and operates a plant, in the city of Hammond, Indiana, located about one-half mile from the shore of Lake Michigan, in which it manufactures certain food products from grain; that on November 12, 1906, the Shedds conveyed to the Western Glucose Company, the real estate on which the plant is located, that the Shedds at that time owned, and still own, all the natural land lying between the land so conveyed and the shore of Lake Michigan, subject to certain assessments; that at the time the conveyance was made to appellee's predecessor, the Western Glucose Company, as a part of the consideration therefor, the Shedds granted to said company, its successors and assigns, an easement for a right of way under their land, lying between the lands so conveyed and the shore of Lake Michigan to connect the land with Lake Michigan by two pipe lines of iron, vitrified tile or cement, "to be not less than twenty-four inches in diameter and to be laid so that the tops thereof should be at least one foot below the Chicago city *datum*." That thereafter the Western Glucose Company constructed the pipe lines to within a few feet of the water line of the shore of Lake Michigan and near to Wolf River outlet; that the purpose of the construction of said pipe lines was to provide a sewer outfall for its

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plant and for a water intake whenever the company saw fit to extend its pipe line far enough into the lake to provide an efficient supply of water, all of which was well known to the Shedds at the time they granted the easement; that in February, 1908, said Western Glucose Company sold and conveyed to appellee all its right and title in and to its manufacturing plant and to the real estate including the easement and right of way for said pipe lines; that on September 12, 1909, appellee procured a permit from the United States government to extend said pipes due north of their termination aforesaid and to dredge a channel in said lake in which to lay said pipes, that it is now proceeding with that work; that it had purchased large amounts of material for the work; and has at this time dredged said channel to within about thirty feet of the shore of Lake Michigan and the termination of the pipe line aforesaid; that the Shedds claim to own the land along the shore of Lake Michigan at the point where the pipes terminate and for a long distance west and north thereof, where said pipes are stored, and also claim to have certain rights in the submerged land under the waters of Lake Michigan adjoining the shore line aforesaid, the source and extent of which claim is unknown to appellee; that because of such claim appellee, its contractors and employes, before said work was begun, obtained the permission of the Shedds to throw the sand and earth dredged from the channel on the shore of the lake and to build a tool shanty thereon, and to lay pipes thereon until used; that some time after the pipes had been so placed and the shanty constructed, the dredging of the channel begun, the Shedds served written notice on appellee and its contractor doing the work to stop work immediately and not to move the pipe stored as aforesaid; that the Shedds, their



agents, servants and employes are now threatening to stop the work by force and violence and to prefer false charges against the officers of appellee company, its agents, contractor, servants and employes and cause their arrest, charged with criminal trespass, thereby hindering and delaying the progress of the work; that the defendants, Henry Fisk and William Hyar are the agents and employes of the Shedd, and are at the place where said work is being done and where the pipe is stored, and are threatening to stop the work by force and violence, and refuse to allow appellee or its contractor to remove the pipes so stored as aforesaid and place them in position in the channel; that the Shedd has a large force of men within easy call to prevent the progress of the work; and are now threatening so to do; that the Shedd is a nonresident of the State of Indiana, and resides in the city of Chicago, Illinois, and has no right, title or interest whatever in the submerged land under the waters of Lake Michigan at the point where appellee is undertaking to extend its pipe line, or in and to the land along the shore of Lake Michigan on which said shanty is constructed and on which pipes are stored and on which appellee is throwing sand and earth taken from the channel as aforesaid; that said land is not the natural land, but the lake has been filled in by persons and corporations other than the Shedd; that the Shedd has never purchased the land or acquired title thereto from any person or corporation, or from the State of Indiana, has never had the same surveyed and the survey filed with the proper State authorities and the land so built into Lake Michigan belongs to the State of Indiana, and the Shedd has no right to the exclusive possession thereof, nor has it any right to interfere with appellee's possession thereof for the purposes afore-



said. Facts are averred to show that great damage would result from delay in issuing the temporary restraining order. Appellants answered the complaint by general denial and by several paragraphs of affirmative answer and also filed a cross-complaint. The cause was tried on the issues formed by the general denial, the second paragraph of answer and on the fifth paragraph of cross-complaint. Upon request the court made a special finding of facts and stated its conclusions of law thereon, which were in favor of appellee.

Appellants' motion for a new trial was overruled and judgment was rendered against appellants on the conclusions of law perpetually enjoining them from interfering with appellee in the laying of its pipe lines into Lake Michigan as alleged in the complaint.

The errors assigned and relied on for reversal are the overruling of the demurrer to the complaint for insufficiency of the facts alleged to state a cause of action; error in each of the conclusions of law stated on the special finding of facts, and the overruling of appellants' motion for a new trial. The objections urged against the sufficiency of the complaint are in substance that it does not allege any located line or easement; does not describe or definitely locate the alleged easement or furnish the means of definitely locating the same or of ascertaining the shape, dimension, or position of the easement or right of way and contains no description of the lands over which the alleged way is granted; that it contains no allegation that an easement or right of way has been located or designated, or that a request has been made by appellee to appellants Shedd and Shedd, the owners of the servient estate, to select the location of the way for such easement and that they have failed to so do, or that they had desig-

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nated an unreasonable location for the way, or that appellee had selected the route for the pipe line. On the other hand appellee insists that this is not an action to establish or locate an easement or to quiet title thereto but to enjoin the appellants from interfering with appellee's enjoyment of an easement which has been granted to it by appellants and which carries with it certain riparian rights.

An indefinite easement or right of way which is not specifically located and described is too indefinite to be established and protected by a

1. court of equity. *Fox v. Pierce* (1883), 50 Mich. 500, 15 N.W. 880; *Bright v. Allan* (1902), 203 Pa. St. 386, 53 Atl. 248; *Thomas v. McCoy* (1903), 30 Ind. App. 555, 56 N. E. 700; *Ritchey v. Welsh* (1898), 149 Ind. 214, 48 N. E. 1031, 40 L. R. A. 105; *Liggett v. Lozier* (1892), 133 Ind. 451, 32 N. E. 712. A complaint to enjoin encroachments upon or interference with an easement or right of way is insufficient when it does not furnish the means or data for entering a definite decree, if the facts alleged be admitted or proven, including a definite description as to dimensions and location of such way. To obtain injunctive relief the right to particular and definite way must be clear. *Evansville, etc., R. Co. v. Butts* (1901), 26 Ind. App. 418, 59 N. E. 1070; *Price v. Bayless* (1892), 131 Ind. 437, 31 N. E. 88; *College Corner, etc., Co. v. Moss* (1883), 92 Ind. 119, 123; *Lenniger v. Wenrick* (1884), 98 Ind. 596; *Marion County Lumber Co. v. Tilghman Lumber Co.* (1906), 75 S. C. 220, 55 S. E. 337; *Fox v. Pierce, supra*; *Hagerty v. Lee* (1889), 45 N. J. Eq. 1, 15 Atl. 399; *Manbeck v. Jones* (1899), 190 Pa. St. 171, 42 Atl. 536; Jones, Easements §§883, 884; 14 Cyc 1216-1218. When an un-

2. located right of way is granted, or reserved, the owner of the servient estate may, in the

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first instance, designate a reasonable way, and if he fails to do so, when requested, the owner of the dominant estate may designate it. How-

3. ever, when the owner of the dominant estate or easement, designates the location of the easement, he is required to select a route that is reasonable as to both parties, in view of all

4. the circumstances, and one that will not unreasonably interfere with the grantor, or owner of the servient estate, in the enjoyment of his property. When such way is once selected and located it can not be changed by either party without the consent of the other. *Thomas v. McCoy* (1903), 30 Ind. App. 555, 56 N. E. 700; *Ritchey v. Welsh*, *supra*; Jones, Easements §337.

The complaint does not allege any interference with that part of the way over which the pipe line was first laid to a point near the bank of the

5. lake or Wolf River outlet. The interference is charged with the way over which appellee was seeking to extend its pipe lines from that point into the lake. The only allegation as to the location of this part of the way for the pipe line is that appellee procured a permit from the United States government to dredge a channel in Lake Michigan due north from the terminus of said pipe line near the shore, in which to lay the pipe and that they had dredged the channel to within thirty feet of the shore when appellants interfered with and stopped the progress of the work. The real estate over which the way was granted is not described, nor is it alleged that the way over which the line was to be extended into the lake had been located by any one, or that appellee had requested the Sheddts to select the location and that they had failed or refused so to do, or that they had selected an unreasonable location, or that appellee had itself chosen the route

Appellee contends however, that as a riparian owner it had the right to extend its pipes into the lake at right angles from the lake shore, and that

6. this right obviates the objections that might otherwise be successfully urged against the complaint. An easement in land bordering on a body of navigable water carries with it such riparian rights in the submerged lands between the

7. shore and the navigable portion of such body of water as are appropriate and necessary to give effect to such easement. The portion of such submerged lands over which riparian rights may be asserted, is as a general rule determined between adjoining property owners by extending lines from the water's edge at right angles to the prevailing shore line. *Clark v. Campau* (1869), 19 Mich. 325; *Hanford v. St. Paul, etc., R. Co.* (1890), 43 Minn. 104, 42 N. W. 596, 44 N. W. 596, 7 L. R. A. 722; *Northern Pine Land Co. v. Bigelow* (1893), 84 Wis. 157, 54 N. W. 496, 21 L. R. A. 776; *Newhaven Steamboat Co. v. Sargent & Co.* (1882), 50 Conn. 199, 47 Am. Rep. 632; *Delaware, etc., R. Co. v. Hannon* (1875), 37 N. J. L. 276. The complaint shows that appellants, Shedd and Shedd, are the owners of the land bordering on Lake Michigan between the part conveyed to appellee's predecessor and the lake. Some of the averments of the complaint are in a sense contradictory of the riparian rights of appellants, but appellee in its brief states that "Appellants are riparian owners and certain rights in the submerged lands are appurtenant to such ownership." Appellee also states that the contradictory averments were inserted in the complaint to raise an issue as to the right of appellee to store pipe and erect a tool shed near the shore, but that the issue was not tried and is not a question in the case. Therefore the averments of the complaint, as

well as appellee's admission, show that appellants are riparian owners of that portion of the lake front through which appellee claims the right to extend its pipe lines into the lake. The issue presented is not the right to lay a pipe line into the lake, for the right so to do is not controverted. The dispute is as to the location and direction of the pipe line from the point near the shore where the portion of the line first laid ended. The averments show that appellee's right to the easement was originally given by grant in a deed of conveyance from the Shedd's to its predecessor. According to the allegations of the complaint the easement extended not only to the shore but out into the lake. Whatever right the Shedd's had to extend such pipes into the lake was granted to appellee's predecessor and is now held by appellee under the grant. But aside from the theory of the complaint we are unable to see that the rights of a riparian owner, if such rights be conceded to appellee, aid the complaint. The right to extend the pipe line into the lake whether obtained by covenant or by virtue of riparian ownership, does not settle the question of the particular location of the easement. The location of the territory over which riparian rights may be asserted by extending lines out into the body of the water at right angles to the shore line is generally invoked to determine the dividing lines between adjoining riparian owners, and we are unable to find any authority for applying it to determine a dispute as to the particular location of an easement on the property over which it is granted in general terms. The deed contains provisions which confer the right, but does not definitely locate the pipe line. By the averments of the complaint appellants are shown to own and control the riparian rights appurtenant to the land over which the easement is granted subject only to the

dominant right of appellee to such easement. The rules for the location of an easement granted, but not definitely located, are applicable here. The rights of other riparian owners are not involved according to the averments of the complaint and the rules for locating riparian property are not applicable. The interested parties under such a grant may make any reasonable location of the

8. easement on the property over which it is to extend, so long as they do not encroach upon or interfere with other property. *Kinney v. Hooker* (1892), 65 Vt. 333, 336, 26 Atl. 690, 36 Am. St. 864.

Appellee in effect admits that the complaint is subject to the infirmities already pointed out but contends the defects are cured by the aver-  
9. ments of the answer, or are rendered harmless by the special findings. "When a pleading is tested by demurrer, it must stand or fall by its own averments. It can find neither weakness nor strength from other parts of the record." *Pittsburgh, etc., R. Co. v. Moore* (1899), 152 Ind. 345, 348, 53 N. E. 290, 44 L. R. A. 638. See, also, *Cole v. Gray* (1894), 139 Ind. 396, 399, 38 N. E. 856; *Runner v. Scott* (1898), 150 Ind. 441, 50 N. E. 479. Appellee relies on the cases of *Watkins v. Gregory* (1841), 6 Blackf. 113; *Wiles v. Lambert* (1879), 66 Ind. 494; and *Lux, etc., Stone Co. v. Donaldson* (1904), 162 Ind. 481, 68 N. E. 1014, but they give no support to the contention. They hold that the omission from a complaint of a material averment may be cured or rendered harmless by an admission of the adverse party in his answer. We hold the complaint in the case at bar insufficient, but the question remains as to whether by reason of the issues presented on the answer and cross-complaint, the error may be held harmless because of the special

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finding of facts, the conclusions of law and the exceptions thereto.

Appellee contends that the overruling of a demurrer to a complaint is not material in an action where the court finds the facts and states conclusions

10. of law thereon, for the reason that an exception to the conclusions of law presents the same question as those arising on demurrer to the complaint. An exception to conclusions of law admits for the purpose of the exception that the facts within the issues have been fully and correctly found. *Kline v. Dowling* (1911), 176 Ind. 521, 96 N. E. 579; *Warrick v. Spry* (1912), 49 Ind. App. 327, 97 N. E. 361; *Wills v. Mooney-Mueller Drug Co.* (1912), 50 Ind. App. 193, 97 N. E. 449; *Myers v. Reynolds* (1911), 47 Ind. App. 233, 94 N. E. 345; *Hornaday v. Cowgill* (1913), 54 Ind. App. 631, 101 N. E. 1030, and cases cited. But it is not true that in every case where there is a special finding of facts that an exception to the conclusion of law renders a consideration of the complaint unnecessary. The findings may be outside the issues in which case they do not aid the complaint but must be disregarded. *Goodwine v. Cadwallader* (1902), 158 Ind. 202, 205, 61 N. E. 939; *Runner v. Scott* (1898), 150 Ind. 441, 442, 50 N. E. 479; *Shank v. Trustees, etc.* (1911), 47 Ind. App. 331, 85 N. E. 95, 93 N. E. 452; *Radebaugh v. Scanlan* (1908), 41 Ind. App. 109, 82 N. E. 544; *Fleming v. Greener* (1909), 173 Ind. 260, 267, 87 N. E. 719, 90 N. E. 72, 140 Am. St. 254, 21 Ann. Cas. 959. The special findings may show that the overruling of a demurrer to an insufficient paragraph of complaint or answer was harmless, where there is another good paragraph upon which the finding and judgment rest. *Radebaugh v. Scanlan, supra*; *Goodwine v. Cadwallader, supra*. Where the facts are fully and correctly found within the issues



an exception to the conclusions of law presents the same question as a demurrer to the complaint for insufficiency of the facts alleged to state a cause of action. *Campbell v. Smith* (1913), 180 Ind. 159, 161, 101 N. E. 89; *Judy v. Jester* (1913), 53 Ind. App. 74, 84, 100 N. E. 15; *Town of Cicero v. Lake Erie, etc., R. Co.* (1913), 52 Ind. App. 298, 308, 97 N. E. 389; *Muncie, etc., Traction Co. v. Citizens Gas, etc., Co.* (1913), 179 Ind. 322, 332, 100 N. E. 65.

Appellants claim that certain of the findings are outside of the issues because (1) the complaint does not describe the shape, dimensions or position of the easement, and (2) fails to show a request by the appellee for the location of the way and the refusal to grant it by appellants. We have held the complaint defective for the failure to make such averments, but now consider the question as affected by other pleadings. Issues were formed on the second paragraph of affirmative answer and on one paragraph of cross-complaint. It is averred in the answer, that appellants are the owners of all the natural land lying between the real estate conveyed and the shore of Lake Michigan, describing it as follows: "All that portion of lots two (2) and four (4), in section thirty-six (36), in township thirty-eight (38) north, of range ten (10), west of the second principal meridian, in Lake County, Indiana, lying northeasterly of the Baltimore and Ohio Railway, northwesterly from the center line of the outlet or mouth of Wolf River, and southeasterly from the premises enclosed and occupied by one Eggers." That on the north, said real estate borders on Lake Michigan, and on the east side thereof extends to the center line of Wolf River. It is further averred that shortly after the execution of the deed of conveyance, providing for an easement under said lands appellants "indicated,

told, notified, and pointed out to said Western Glucose Company, the site, place and location of said proposed easement, and right of way to be used by it in the erection and construction of said pipe lines under the lands of these defendants." That the line so pointed out to said company "was in a convenient place, extending in a straight line from plaintiff's plant, in a northerly direction to Lake Michigan, at a point and position west and westerly from defendants' said piers, docks and harbors;" that the location indicated and pointed out for the location of such easement was "in a place and position well and reasonably well adapted for the use and convenience of" said company. That appellee was not "granted any rights or privileges whatsoever to lay and place said pipe lines, or any part thereof, on or under" said real estate, at the place and location where it is seeking and attempting to lay them. That the place where appellee is seeking and attempting to lay said pipe lines is into Wolf River at a point near the south end of the piers and docks of appellants and that it is the intent and purpose of appellee to lay the pipes upon the bottom of the lake near and within about ten feet from appellants' piers and docks.

The fifth paragraph of cross-complaint contains substantially the same averments in this respect. These averments describe the real estate over which the easement was granted, allege that a reasonable and suitable route for the pipe line was pointed out and designated by appellants and state where it was located. They put in issue all the facts omitted from the complaint, for the omission of which we held it insufficient, unless it be an affirmative allegation that the Shedd located the pipe line east of their pier, and on this subject the answer and cross-

complaint state the negative of such averment, and charge that appellee intended to lay the pipes east of the pier. The finding of facts based on the affirmative allegations of the answer and cross-complaint is not outside the issues of the case. *Goodwine v. Cadwallader*, *supra*, 205; *Lux, etc., Stone Co. v. Donaldson*, *supra*; *Runner v. Scott*, *supra*; *Daly v. Gubbins* (1908), 170 Ind. 105, 108, 82 N. E. 659.

The court has found that the Sheddts located the easement east of their pier. An examination of the briefs shows that the question of the particular pointing out and location of the easement was fully tried out by the court and that all the parties introduced much evidence on the subject. No objection to any of such evidence is shown in the motion for a new trial or pointed out in the briefs. There is no indication anywhere that appellants were surprised or unprepared to meet the issue, but the briefs show conclusively that the issue was as fully tried and determined as it could have been had the complaint contained the averment. The amendment of the complaint to supply the affirmative allegation that the Sheddts located the easement east of their pier was such that the court could have allowed it to be made at any time during the proceedings and doubtless would have permitted it to be done on request. Section 405 Burns 1914, §396 R. S. 1881, provides that the court may at any time in its discretion direct "any material allegation to be inserted, struck out, or modified—to conform the pleadings to the facts proved when the amendment does not substantially change the claim or defense." In this case the pleadings, at least, in a negative way brought the question into the case and as already shown the question was tried and determined as though it were in issue. Section 700 Burns 1914, §658 R. S. 1881, provides that no judgment shall be

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reversed for any defect contained in the pleadings "which by law might be amended by the court below, but such defects shall be deemed to be amended in the supreme court; nor shall any judgment be stayed or reversed in whole or in part, where it shall appear to the court that the merits of the cause have been fairly tried and determined in the court below." These statutes are clearly applicable to the question of the location of the easement and for the purposes of this decision the complaint will be deemed amended in the particular mentioned. *Driscoll v. Penrod* (1911), 176 Ind. 19, 25, 95 N. E. 313; *Louisville, etc., Traction Co. v. Lottich* (1915), 59 Ind. App. 426, 106 N. E. 903, and cases cited; *Chicago, etc., R. Co. v. Gorman* (1915), 58 Ind. App. 381, 106 N. E. 897.

The finding cannot be aided by the conclusions of law, and to warrant a recovery every fact material to the plaintiff's cause of action must be

12. found and stated, or must necessarily and clearly arise by inference from the facts so found and stated by the court. The failure to find a material fact is the equivalent of a finding against the party upon whom rests the burden of

13. proving such fact. *Judah v. F. H. Cheyne Electric Co.* (1913), 53 Ind. App. 476, 483, 101 N. E. 1039; *Behler v. Ackley* (1909), 173 Ind. 173, 179, 89 N. E. 877; *Crawfordsville Trust Co. v. Ramsey* (1913), 55 Ind. App. 40, 100 N. E. 1049, 102 N. E. 282; *Bradway v. Groenendyke* (1899), 153 Ind. 508, 512, 55 N. E. 434; *Cleveland, etc., R. Co. v. Closser* (1890), 126 Ind. 348, 367, 26 N. E. 159, 22 Am. St. 593, 9 L. R. A. 754. The findings in the case cover the averments of the complaint and also include facts put in issue by the special answer and the cross-complaint, and those tried and determined as already shown.

Keeping these facts in mind we set out the substance of such findings as are necessary to a determination of the questions presented by the exceptions to the conclusions of law. In addition to the question already considered, those most strongly urged related to the pointing out and location of the pipe line, to the fouling of the water, and to the failure to make certain persons defendants to the suit, whom it is alleged were necessary parties to a full and complete adjudication of the questions at issue. It is found that Wolf River is the outlet of Wolf Lake into Lake Michigan; that the lands conveyed by Shedd and Shedd to appellee's predecessor, on November 12, 1906, lie along the west bank of Wolf River approximately one-half mile south of Lake Michigan; that the Shedds at that time were and have continued to be the owners of all the lands lying between the real estate so conveyed and the shore of Lake Michigan, containing about twenty-five acres; that the lands east of Wolf River are owned by the heirs of Caroline M. and Jacob Forsyth; that the United States government beginning in 1873 made several surveys of Wolf River and Wolf Lake in contemplation of a harbor on Lake Michigan at the mouth of Wolf River; that it was found to be feasible to establish a harbor, but on account of the cost, or for other reasons, no harbor was established; that neither Wolf River nor Wolf Lake is navigable water of the United States; that the land of the Shedds bordering on Lake Michigan is of the value of \$5,000 per acre; that in 1883 the Shedds constructed a pier about 150 feet west of the northeastern boundary of said tract which extended into the lake 500 feet at right angles with the shore line; that about 1897 the Forsyths built a pier 150 feet east of the northwestern boundary of their lands, and the space between said piers

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was afterwards known as Wolf River outlet or harbor and has been so known for twenty years; that said piers are 300 feet apart and the water between them varies in depth from one inch to ten feet; that the Forsyths have at times partly dredged the space between said piers at the mouth of Wolf River with a view of making a harbor, but it has never been of sufficient depth to admit vessels drawing water more than a depth of seven feet and the harbor is not navigable for lake vessels; that in 1895 the Shedd's extended their pier an additional 500 feet into the lake; that Charles B. and Edward A. Shedd owned the real estate sold as aforesaid and are brothers and reside in the city of Chicago; that in making the sale of the land to appellee's predecessor, the Western Glucose Co., Charles B. Shedd conducted the negotiations and consummated the sale with said company which was represented by William E. O'Neil and Daniel B. Scully; that in the manufacture of its products appellee requires about three or four million gallons of pure cold water per day and one of the inducements to the purchase of said land was its close proximity to Lake Michigan; that during the negotiations for the purchase of said land Charles B. Shedd pointed out to Scully and O'Neil a right of way and easement from the land so purchased, to Lake Michigan, over which the pipe line was to be laid, which line extended to the water's edge of Wolf River outlet or harbor "and then on the easterly side of the pier erected by Shedd and Shedd and parallel therewith and through the water of Wolf River outlet or harbor, and on into Lake Michigan"; that the pointing out of such right of way for the pipe line was a part of the consideration and was one of the inducements, for the purchase of the site for the proposed plant; that in 1907 said plant or factory was

constructed and two pipe lines were laid about one foot apart from the plant northward to within 25 or 50 feet of the then ordinary water line of Wolf River outlet; that the pipes were laid in accordance with the terms of the grant and the purpose was known to the Shedds; that a catch basin was constructed twenty-five to fifty feet south of the ordinary water line of Wolf River harbor; that said basin was located forty feet east of a line parallel with and extended south of said pier; that the pipes were six feet below the surface of the ground where they entered the catch basin; that long after the completion of said pipe lines, Charles B. Shedd pointed out to William E. O'Neil, one of the directors of said company, a line extending from said catch basin out into Lake Michigan between said piers and parallel with and east of the pier erected by the Shedds as aforesaid; that in 1907, said company entered into a contract with one Johnson to extend said pipe line parallel with and about fifteen feet east of the Shedd pier which contract was duly authorized by the board of directors of said company, of which Charles B. and Edward A. Shedd were members and they were present and voted in favor of the contract; that on account of a shortage of funds and the lateness of the season the contract was afterwards cancelled; that thereafter the name of said company was duly changed to the American Maize Products Company; that the plant was put in operation in the fall of 1907, and the outfall therefrom passed through the outfall pipe so constructed "and the company dug and maintained a small ditch or sluice way from the catch basin to the water's edge a distance of about forty or fifty feet, so that the outfall could reach the water at a point between the two piers", all of which was done with the knowledge, consent and approval of the



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Shedds; that the outfall from the plant has continued to pass through said pipe and on through Wolf River harbor into Lake Michigan; that in 1909, after the granting of the temporary restraining order the outfall pipe was extended 200 feet from the catch basin and emptied the outfall directly into Wolf River harbor about 100 or 125 feet from the water's edge; that at no time prior to the beginning of this suit in September, 1909, did the Shedds in any manner express to appellee or any of its officers or agents any objection whatever to the emptying of said outfall as aforesaid; that nothing but the outfall from said plant has passed through said pipes; that prior to early winter of 1910, the outfall polluted the water and created a disagreeable odor in the vicinity; that no person lives in the vicinity of said Wolf River harbor except one John Cuneo, a fisherman, who erected a shanty on the lands of appellants and paid a rental therefor and for the privilege of fishing along the piers; that in the fall of 1910, appellee installed a plant at a cost of \$25,000, consisting of septic tanks to precipitate the solids from said outfall before the same enter into the pipes which conduct it into Wolf River harbor; that as a temporary arrangement when the plant was constructed, appellee took water from Wolf Lake but in the summer of 1909 the water from the lake became unfit for the purpose of manufacturing food products and appellee contracted with the Calumet Construction Company to extend the intake pipe from the catch basin 2,000 feet into Lake Michigan, at right angles with the shore line of the lake and about fifteen feet east of and parallel with the Shedd pier, and to extend the outfall pipe 200 feet; that in 1908, the Shedds disposed of their interests in the company and were not at this time interested therein. "That neither before entering in-

to the contract with the Calumet Construction Company, nor at the time of entering into said contract for the extension of said pipe lines did the plaintiff make any demand of the defendants Shedd and Shedd or either of them or upon either of them for the location of the remaining portion of the easement for the said pipe lines, nor has any such demand been made at any time, either before the beginning of this action or since the beginning of this action, nor before the beginning of the work in 1909 to extend said pipe lines by plaintiff as aforesaid." That the contractor obtained permission from the Shedds to store pipe on their land to be used in the extension of said pipe line, and was then informed that the Shedds desired the line laid west of their pier; that this fact was communicated to appellee; that the Calumet Construction Company procured from the United States government a permit to lay said pipes in the bed of the lake; that in September, 1909, said construction company began dredging and before the work was completed was notified by the Shedds to stop the work and a similar notice was served on appellee; that the Shedds tendered appellee a right of way for the pipe line west of the pier which it refused to accept except on the condition that the Shedds pay the additional cost of constructing the line at that place, and this they refused to do.

The finding here states details of the interference and efforts to adjust differences, which were unsuccessful and shows that the work of dredging already done would be lost by the action of the water if the work was delayed, and appellee would suffer irreparable damage, the details of which are stated but omitted here.

The deed of conveyance from the Shedds for the factory site among other provisions contains the

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following: "The grantors being the owners of the land lying north and northeast of the land herein conveyed and lying between said land and Lake Michigan subject to public highway, pipe line rights and the different railroad companies whose railroads pass between the land herein conveyed and Lake Michigan do hereby grant an easement to the grantee its successors and assigns for a right of way under said land to connect the land herein conveyed with Lake Michigan by two pipe lines of iron, vitrified tile or cement, said pipes to be not less than twenty-four (24) inches in diameter, and to be laid so that the tops of said pipes shall be at least one (1) foot below Chicago city *datum*. It is further agreed that in the event of the grantors wishing to change or lower the grade of said pipes hereinbefore referred to, they may do so provided said change is made entirely at their own expense and in a manner that will not unreasonably interfere with the continuous operation of the factories or plants of the grantee or its assigns. \* \* \* It is further understood and agreed that no foul or polluted water shall be emptied into Wolf River or Lake or anything that will contaminate the waters thereof."

It is further found that on September 29, 1909, appellee applied to the Lake Superior Court for a temporary restraining order against appellants and certain alleged employes and agents, to prevent their interference with the laying of said pipes east of the Shedd piers, which order was issued by the court without notice, and the day was fixed for the hearing on the temporary order; the motion to dissolve the temporary order was overruled and the order was thereafter made permanent; that after the restraining order was issued appellee by and through said construction company proceeded to

and did lay said pipe line as above indicated; that the pipes were iron thirty-six inches in diameter, in ten feet joints and were laid at a depth of about nine and one-half feet below the surface of the water and two and one-half feet below the bed of Wolf River harbor, and about ten feet east of the Shedd pier. "The plaintiff in the construction of said pipe lines, as hereinbefore found, did not extend the pipe lines in the same direction and course as followed by the pipe lines as constructed in the year 1907, but the course and direction of said pipe lines were changed by plaintiff to a more easterly direction and extended through said Wolf River harbor and to the east of the piers of the defendants Shedd and Shedd; that the line and course followed by the plaintiff in the construction of said pipe lines in 1907 when extended northward toward Lake Michigan from the point where the work was stopped at the catch basin in 1907, extended, would be and lie across the southerly end of the pier, and onto the westward of said pier a distance probably of sixty feet or more at the outlet in Lake Michigan and would cross said pier at the extreme south end." That the laying of said pipes would interfere with dredging Wolf River harbor to a depth suitable for lake vessels, but the same could be lowered at a cost of one dollar per lineal foot; that it would cost \$11,000 more to lay the pipe on the line requested by the Shedds west of the pier than to lay it east of the pier on the line where it was laid. "That the pouring of said outfall waters into the waters of said Wolf River outlet, through said outfall pipe, has rendered said Wolf River outlet unfit for the habitation of fish, and has completely destroyed said Wolf River outlet as a fishing place, and has driven the fish out of said Wolf River and harbor, and has destroyed Wolf River outlet and harbor as a fishing

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place. \* \* \* The court finds that the mouth of Wolf River at the point where it empties into Wolf River harbor and for several hundred feet southward has been filled with beach sand by the action of the lake waters, and no water runs from Wolf River into the lake except at such times in the year when the waters in Wolf Lake are very high, when Shedd and Shedd and other landowners in the community would open a channel into the harbor for the overflow water to pass out; then, as soon as the overflow water was relieved and ceased to flow, the action of the water of the lake would close the channel."

That prior to emptying said outfall into the waters of Wolf River outlet the place was a habitat for various kinds of fish; that the Shedd's leased said piers for a fishing place in Wolf River harbor; that since the construction of said pipe lines appellee continued to empty the outfall from said factory through the pipes into Wolf River outlet and harbor and will continue so to do unless restrained from so doing; that the pipes were laid after the temporary injunction was issued and the same can be removed at a cost of one dollar per lineal foot; "That the position and location of said pipe lines, as laid by plaintiff, as hereinbefore found, in said Wolf River outlet and harbor, will prevent the further dredging and improvement of said harbor, along the said piers belonging to said defendants Shedd and Shedd; said pipe lines will also prevent the use of said piers for shipping purposes, until the same are in some manner removed or lowered from their present position, with boats drawing more than seven feet of water."

The finding also shows that in 1888, the several owners of the land on both sides of Wolf River outlet or harbor, to settle a dispute as to the boundary

between the land on the east and the west thereof, mutually conveyed to each other a strip of land approximately 150 feet wide on each side of the dividing line, and dedicated the same as a waterway and harbor 300 feet wide, and in said instrument provided: "the said parties do hereby \* \* \* mutually grant unto each other, and to the United States of America, and to the State of Indiana, that the said strip of land 300 feet wide from the said Baltimore, Ohio & Chicago Railroad to Lake Michigan be, and is hereby dedicated to public use as a public highway to be a waterway forever; said strip being by the parties hereto agreed to be the due and proper outlet and mouth of Wolf River, and a harbor upon Lake Michigan \* \* \* ", and further provided that such channel 300 feet wide should extend into Lake Michigan at right angles to the shore line and that all the land west of the center line of such 300 feet channel shall belong to Morgan & Smith and their assigns, who then owned the land now owned by the Shedds, and that the land east of such center line shall belong to Caroline M. Forsyth, her heirs and assigns. The instrument further provides: "if at any time either of said parties or their assigns shall desire to make a channel of the full width of three hundred (300) feet the party so desiring such channel to be made or cleared out, may do so at the expense of the party so desiring, provided the party so clearing or widening the channel to three hundred (300) feet, shall protect the widened channel from being filled up by proper breakwaters."

It is contended that the findings to the effect that the pointing out of the way for the pipe line from the factory to Lake Michigan was an induce-

14. ment to the purchase of the factory site and entered into the consideration therefor, are

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outside the issues and can not be considered for that reason and for the further reason that such facts tend to vary the terms of the deed containing the grant of the easement; that all prior negotiations are merged in the written instrument. An easement is an interest in land, and a deed by which it is granted, like other written contracts, becomes the repository of the entire agreement, and in the absence of fraud or mistake, can not be varied by parol evidence. But notwithstanding this general rule the actual consideration may be shown by parol evidence even though it differs from that expressed in the instrument. In this instance the pointing out of the location for the proposed pipe line and the accessibility of the water needed in manufacturing the products of the factory, were important considerations, and it was proper to hear evidence relating thereto and to find the facts accordingly. The pointing out of the location for the pipe line in no way contradicted the deed, but only gave practical effect to the easement granted by it, in general terms, but not definitely located by its provisions. *Indianapolis Southern R. Co. v. Wycoff* (1912), 51 Ind. App. 159, 95 N. E. 442, and cases cited; *Steele v. Michigan Buggy Co.* (1912), 50 Ind. App. 635, 638, 95 N. E. 435. In *Kinney v. Hooker, supra*, the court said: "When a way is not located by the grant, the parties may locate it by parol agreement at any point on the premises over which the right is granted, and evidence of such agreement is admissible and does not contradict or vary the deed, provided the way is located within the boundaries of the land over which the right is granted." The court having found that the pipes were laid on the line pointed out by the Shedds, the fact of inducement is immaterial and does not affect any substantial right of either of the parties.



We have already decided that the issues formed on the special answer and cross-complaint and the questions tried by the parties as though in 15. issue, authorized the finding of facts made by the court. The findings show that during the negotiations for the sale of the factory site, appellants, the Shedds, pointed out the line of the proposed easement, and that subsequent to the purchase of the land and the laying of the pipe lines to the catch basin, they again pointed out such way for the pipe line, and in each instance located it east of the Shedd pier, substantially in the place where the pipes were afterwards laid. The findings also state that in extending the pipes from the catch basin out into the lake in 1909, the course and direction of the lines were changed to a more easterly course than that indicated by extending the line in the same direction the pipes were laid from the factory to the catch basin in 1907, and that they extended through Wolf River harbor and to the east of the Shedd pier, and that the pipe line if extended in the same direction as that first laid would be west of said pier. It is earnestly contended that this shows a change in the location of the easement by appellee and that for such reason it should not have obtained the relief granted by the trial court. The findings are to be read as a whole and fairly construed as already indicated in this opinion. They do show that the pipe would have been laid west of the pier if the line had not been changed from the direction indicated by the location of the pipe laid from the factory to the catch basin, but they do not show that it was changed from the line originally pointed out and designated by the Shedds. It is expressly stated in the finding that on two occasions, one before and one after the sale of the land, the Shedds pointed out to a representative of

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appellee's predecessor the way for the easement on the east side of the Shedd pier. Having once located it, neither party to the transaction could change the location without the consent of the other. *Ritchey v. Welsh*, *supra*, 221; *Onthank v. Lake Shore, etc., R. Co.* (1877), 71 N. Y. 194, 27 Am. Rep. 35; *Winslow v. City of Vallejo* (1906), 148 Cal. 723, 84 Pac. 191, 113 Am. St. 349, 58 L. R. A. (N. S.) 851, 7 Ann. Cas. 851; *Jennison v Walker* (1858), 77 Mass. 423.

It is found that neither before entering into the contract with the Calumet Construction Company nor at any time after entering into said contract for the extension of said pipe lines, did appellee demand or request the Shedds to locate the remaining portion of the easement. In effect it is contended that these findings show that the Shedds were deprived of their legal right to locate the easement and that appellee wrongfully located that portion of it extending from the catch basin out into the lake. These findings are not in conflict with those which show that prior to the time of letting the contract to the Calumet Construction Company in 1909, the Shedds had located not only the portion of the line actually laid in 1907, but the remaining portion extending from the catch basin out into the lake. Having once located the whole easement, the mere fact of delay in completing the line would not necessitate a relocation of the part not laid until a later date. There is no finding of any agreement changing the location originally pointed out, nor any showing that would give to appellants, the Shedds, the right to again locate the easement extending from the catch basin out into the lake. From this, it follows that the findings on the subject of the location of the easement support the conclusions of law.

It is also contended that the findings show that appellee created and continued a nuisance by emptying its outfall into Wolf River outlet, and that

16. for this reason it was not entitled to the injunctive relief granted by the court's decree. Under the court's finding, appellee laid its pipe line in the location designated by the Shedd's. The finding also shows that from the beginning of the operations of the plant in 1907, appellee emptied the outfall in the space between the piers leading out into Lake Michigan, first by a ditch from the catch basin, and afterwards by a pipe, and that appellants, the Shedd's, with full knowledge thereof made no objection or complaint on account of the alleged pollution until this suit was begun. There is no showing that the laying of the pipes from the catch basin in any way increased the pollution of the water or rendered it more injurious, but the findings do show that in the fall of 1910 appellee installed an expensive system of septic tanks to avoid polluting the water. The special finding of facts made by the court was not filed until November 18, 1911, and the final judgment was rendered December 1, 1911. In *City of Logansport v. Uhl* (1885), 99 Ind. 531, 50 Am. Rep. 109, the Supreme Court quoted with approval from 1 High, Injunctions §884, "One who has by his own acts consented to or acquiesced in the use of water in a particular manner, will be estopped from afterwards enjoining its use in that manner." In the same case the court on page 540 said: "This doctrine of acquiescence as a *quasi* estoppel is one of general application in proceedings to restrain the wrongful acts of another, and to which effect has been given in numerous cases arising out of controversies concerning the use, or right to use, water in flowing streams. But to make acquiescence ef-

fective to such an extent, it must necessarily have been voluntary, and with knowledge of the wrongful acts complained of, and of their probable injurious consequences." In 1 High, Injunctions (4th ed.) §756, it is said: "Long continued acquiescence in the erection of works which it is afterwards sought to enjoin as a nuisance may constitute a bar to relief. And it may be asserted as a rule that long delay upon the part of plaintiff who seeks to enjoin a nuisance will afford sufficient reason for refusing him relief in equity. The rule is extended even further, and it is held that one party may so encourage another in the erection of what he afterward complains of as a nuisance, as not only to deprive the aggrieved party of the right to equitable relief, but to give the adverse party a right to invoke the aid of equity to restrain proceedings at law for the recovery of damages resulting from the alleged nuisance." As bearing by analogy on the question, see, also, *McClaren v. Jefferson School Tp.* (1907), 169 Ind. 140, 145, 82 N. E. 73, 13 L. R. A. (N. S.) 417, 13 Ann. Cas. 978, and cases cited; *Porter v. Midland R. Co.* (1890), 125 Ind. 476, 478, 25 N. E. 556, and cases cited; *Loy v. Madison, etc., Gas Co.* (1901), 156 Ind. 332, 338, 58 N. E. 844; *Board, etc. v. Plotner* (1897), 149 Ind. 116, 121, 48 N. E. 635; *Barnard v. Sherley* (1893), 135 Ind. 547, 568, 34 N. E. 606, 35 N. E. 117, 41 Am. St. 454, 24 L. R. A. 568.

In determining the correctness of appellants' contention in regard to the fouling of the water, it is important to keep in mind the issues. Appellee brought suit to enjoin appellants from interfering with the laying of the pipes east of the Shedd pier. Appellants seek to prevent the granting of the injunction by showing that the outfall from the fac-

tory has fouled, and will continue to pollute the water and make it offensive. On the facts as found, appellants are placed in the position of asking the court to deny appellee the right to lay its pipes in the place designated by them, because appellee, for two years with the knowledge and acquiescence of appellants, has fouled the water of Wolf River outlet to the extent shown by the findings, but without showing that the laying of the pipes will make the water more injurious or offensive. The right to the easement is derived from the deed, as already shown, and its definite location was fixed by the Shedd pointing out and locating it east of the pier. As between appellee and the Shedd, the facts and circumstances show such acquiescence in the discharge of the refuse from the factory into Wolf River outlet, as to deprive them of any right they might otherwise have had (which we do not here determine) to object to the laying of the pipes east of the Shedd pier because of the effect of the refuse from the factory on the water. In arriving at this conclusion it is not necessary for us to determine, and we do not decide, what right appellants, or others, may have to relief from the maintenance or continuance of a nuisance by the alleged pollution of the water. The contention that the finding shows the creation and continuance of a nuisance, if conceded to be correct, can not avail appellants under the issues and the facts shown by the findings. The question of a public nuisance or of appellants' right to relief therefrom because of special damages is not involved here. The questions presented relate to contract rights and the conduct of the parties in relation thereto. The findings support the conclusions of law stated thereon in favor of appellee.

It is also contended that the judgment is contrary

to law because the owners of the land east of Wolf River outlet were not permitted to inter-

17. vene; that the Forsyths were necessary parties to a full and complete adjudication of the issues of the case. This contention is based on the interest in the space between the piers conveyed to Oliver O. Forsyth, *et al.*, by deed as stated in the findings. Appellants contend that they could not themselves lay the pipes in said space and that appellee, their grantee, can not do so without the consent of the Forsyths.

The findings show that the owners of the land on either side of the piers had the right to dredge out the entire space between the piers for the purpose of making a harbor suitable for lake-going vessels; that the Forsyths had previously done some dredging, but the harbor had not been deepened to accommodate vessels drawing water to a depth of more than seven feet, and is not now "navigable for lake vessels"; that the pipes have been laid to a depth of nine and one-half feet below the surface of the water, and two and one-half feet below the present bed of the harbor; that to make the harbor suitable for general use by lake vessels it would be necessary to dredge it to a depth of from twenty-two to twenty-five feet; that the pipe lines as laid would prevent dredging along the Shedd pier but they could be lowered at a cost of one dollar per lineal foot. The findings also show that it is provided in the deed from Shedd to appellee's predecessor that if the grantors wish to "change or lower the grade of said pipes \* \* \* they may do so provided said change is made entirely at their own expense and in a manner that will not unreasonably interfere with the continuous operation of the factories or plants of the grantee or its assigns." The findings also show that it is practicable to

dredge the harbor to a depth suitable for general use by lake vessels, but there is no showing that the Forsyths or any one else having the right so to do, has recently made any effort to dredge the harbor, or is proposing now, or at any time in the future, to dredge it to such a depth that appellee's pipes will become an obstruction. The pipes are laid on the property of the Shedd's in which the owners of the Forsyth land have no interest except the right to dredge and make a harbor for general use. It can not now be known from the showing made that the pipes will ever become an obstruction. Until the pipes interfere with some right granted the Forsyths by the Shedd's, the former have no cause of complaint against the latter. There is no present injury or such invasion of a right as will create a cause of action. Pipes laid two and one-half feet below the bed of the harbor can not interfere with the rights of any one so long as the harbor is maintained in its present condition. The presence of pipes that can be removed or lowered is not a denial of the right to dredge the harbor. *New York, etc., R. Co. v. Hamlet Hay Co.* (1898), 149 Ind. 344, 349, 47 N. E. 1060, 49 N. E. 269; *Sherlock v. Louisville, etc., R. Co.* (1888), 115 Ind. 22, 38, 41, 17 N. E. 171; *Reasoner v. Creek* (1885), 101 Ind. 482, 484; 1 High, Injunctions (4th ed.) §861

If the owners of the land east of the piers undertake the work of dredging the harbor to a depth below the level of the pipes, and the Shedd's or their grantees, fail or refuse to remove or lower the pipes so that they will not interfere with such work, a question may then arise quite different from that now under consideration. Section 273 Burns 1914, §272 R. S. 1881, provides that: "The court may determine any controversy between the parties before it, when it can be done without prejudice to



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the rights of others or by saving their rights; but when a complete determination of the controversy can not be had, without the presence of other parties, the court must cause them to be joined as proper parties." The controversy regarding the location of the pipe line on the facts presented is between appellee and the Shedd, and can be fully adjudicated without in any way affecting the property or rights of the Forsyths. In executing the deed to appellee's predecessor, appellants, the Shedd, seem to have contemplated that they or their assigns, might at some time desire to lower the pipes and accordingly reserved such right, and stipulated the conditions under which the work might be executed. This provision was consistent with the right previously granted the owners of the Forsyth land and being inserted in the deed was doubtless intended to provide for the emergency, if it arose, and likewise to be notice to purchasers of the servient estate over which the easement extended, if the land should be alienated. In the case of *Gale v. Frazier* (1886), 4 Dak. 196, 30 N. W. 138, the supreme court of Dakota considered the question of necessary parties, under a statute fully as liberal as that of Indiana, and said a necessary party has such an "interest in the subject-matter in litigation, and of such a direct and immediate character, that she would gain or lose by the direct legal operation and effect of the judgment" rendered. The Forsyths will not lose or gain in a legal sense by the judgment in the case at bar against the appellants. The rights of appellee as against the appellants may be fully determined without the Forsyths being made parties to the suit. The judgment is not therefore erroneous because they have not been made parties. Pomeroy, Code Remedies (3d ed.) §418. *Melvin v. Chancy* (1894), 8 Tex. Civ. App. 252, 28 S. W.

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241; *First Nat. Bank v. Henry* (1900), 156 Ind. 1, 6, 58 N. E. 1057; *Larue v. American, etc., Engine Co.* (1911), 176 Ind. 609, 613, 96 N. E. 772; *Adams v. Ohio Falls Car Co.* (1892), 131 Ind. 375, 379, 31 N. E. 57.

It is also contended that the facts found do not show that appellee is entitled to injunctive relief; that it has an adequate remedy at law. The

18. facts show the right to the easement to be unquestioned; that appellee undertook to lay the pipe on the line designated by the Shedd and had incurred great expense in so doing; that the work already done when appellants interfered would be lost by the action of the water in filling up the channel dredged for the pipes. To deny a party injunctive relief it is not sufficient to show that he has a legal remedy. If the remedy at law is not as prompt, practical, efficient and adequate, as that afforded by equity, the court may grant the injunction. *Cincinnati, etc., R. Co. v. Wall* (1911), 48 Ind. App. 605, 609, 96 N. E. 389; *First Nat. Bank v. Savin* (1911), 47 Ind. App. 266, 272, 94 N. E. 349; *Wabash R. Co. v. Engleman* (1903), 160 Ind. 329, 66 N. E. 892.

Other minor questions are suggested and discussed, but they are not of controlling effect. The court did not err either in overruling the motion for a new trial or in the conclusions of law. There is evidence to support the findings, and the facts found warrant the decree rendered by the trial court. Judgment affirmed. Hottel, C. J., Caldwell, Ibach, Moran and Shea, JJ., concur.

NOTE.—Reported in 108 N. E. 610. Easements in private ways and the rights and obligations of the parties, see 95 Am. St. 318. Location of indefinite right of way by parties interested, see 1 Ann. Cas. 681. See, also, under (1, 5) 14 Cyc 1221; (2, 3) 14 Cyc 1203; (4, 8) 14 Cyc 1205; (6) 14 Cyc 1201; (9) 31 Cyc 322; (10) 3 C. J. 903-906; 2 Cyc 717; (11) 3 Cyc 444; (12) 38 Cyc 1964; (13) 38 Cyc 1985; (14) 17 Cyc 653; (18) 22 Cyc 771.

## DUNTON v. HOWELL.

[No. 8,654. Filed June 23, 1915. Rehearing denied October 5, 1915. Transfer denied November 19, 1915.]

1. APPEAL.—*Review.—Evidence.—Verdict.*—Where the questions involved were disputed questions of fact, and there was evidence to sustain each allegation of the complaint, the verdict for plaintiff must be treated as conclusive, since the court on appeal can not weigh the evidence. p. 186.
2. APPEAL.—*Review.—Waiver of Error.—Briefs.*—Alleged error in the giving and refusing of instructions is waived where no complaint with reference thereto is made in appellant's brief under the points and authorities. p. 186.
3. TRIAL.—*Excessive Verdict.—Action for Compensation.*—Where the evidence showed that plaintiff worked for defendant as a farm hand during three seasons of eight months each, and one season of five months, for which he was to receive twenty dollars per month, and that he had been paid the sum of \$160, a verdict for \$420 in an action to recover the wages due was not excessive. p. 186.
4. APPEAL.—*Questions Reviewable.—Motion for Judgment on Interrogatories.—Record.*—Alleged error in the overruling of a motion for judgment on the jury's answers to interrogatories presents no question, where it appears from the record that such motion was not ruled on by the trial court. p. 186.
5. APPEAL.—*Questions Reviewable.—Demurrer to Reply.*—No question can be presented on the overruling of a demurrer challenging the sufficiency of an affirmative paragraph of reply, where such demurrer is not accompanied by a memorandum of defects as required by §344 Burns 1914, Acts 1911 p. 415. p. 186.

From Huntington Circuit Court; *Samuel E. Cook*, Judge.

Action by Edsell Howell against Sarah Dunton. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

*C. W. Watkins* and *Charles A. Butler*, for appellant.

*George H. Eberhart*, *Fred H. Bowers* and *Milo N. Feightner*, for appellee.

MORAN, J.—Appellee brought an action against appellant to recover a balance, which he alleged to be due him for work and labor performed for ap-

pellant as a farm hand. Judgment was rendered in favor of appellee upon a verdict of a jury in the sum of \$420. From this judgment an appeal has been prosecuted by appellant. Errors assigned are, (1) overruling appellant's motion for a new trial; (2) overruling appellant's motion for judgment on answers to interrogatories; (3) overruling appellant's demurrer to appellee's second paragraph of reply as addressed to appellant's fourth paragraph of answer.

Briefly, appellee's complaint alleges that on March 1, of each of the following years, 1909, 1910, 1911 and 1912, appellant employed appellee as a farm hand at the rate of \$20 per month; for the first three years, he agreed to and did work eight months and for the last year he agreed to and did work five months. Appellant paid appellee the sum of \$160, leaving a balance due him in the sum of \$450. Appellant answered the complaint in four paragraphs; to the fourth, which is an answer of accord and satisfaction, appellee has addressed an affirmative paragraph of reply. The substance of the fourth paragraph of answer is that after appellee had performed all of the labor, for which he was to receive compensation, there was a mutual settlement entered into between appellant and appellee by the terms of which appellee accepted appellant's promissory note, calling for the sum of \$125 in full settlement of all that was due him. The principal allegations of the reply are that appellee was illiterate at the time of the alleged settlement, being unable to read or write, and did not know that the note in question was executed in full settlement, that he was under the impression that the paper he received was a check, upon which he could obtain the money that was due him, and that he was misled and defrauded by appellant.

The causes for a new trial as set forth in ap-

pellant's brief are, (1) the verdict is contrary to the evidence; (2) the verdict was not sustained by sufficient evidence; (3) the verdict is contrary to law; (4) error of court in giving of its own motion instructions Nos. 7 and 8; (5) the damages are too large.

The evidence discloses that appellee was illiterate, being unable to read or write, except, however, he could write his name; he was sub-

1. ject to epileptic fits and had been for many years; he worked for appellant upon her farm for four different seasons. It is appellant's contention, as disclosed by the evidence, that she paid appellee various amounts of money from time to time, which, together with the note she executed for \$125, and delivered to appellee, fully covered all she owed for his labor, and that the note was accepted by him in full settlement of all claims and demands against her. On the other hand, it is appellee's contention, as disclosed by the evidence, that there was due him the sum of \$450, at the time he ceased to labor for appellant, and on account of his illiterate condition, he did not understand the nature and effect of the paper delivered to him, but supposed he was receiving a check, upon which he could draw the money due him from appellant. All of these questions, being disputed questions of fact, were submitted to the jury and the verdict is final in this particular. To inquire into the same would involve the weighing of the evidence, which is not within the province of this court. *Gilchrist v. Hatch* (1915), 183 Ind. 371, 106 N. E. 694; *Gifford v. Gifford* (1915), 58 Ind. App. 665, 107 N. E. 308; *Pittsburgh, etc., R. Co. v. Crockett* (1914), 182 Ind. 490, 106 N. E. 875; *Buchanan v. Caine* (1914), 57 Ind. App. 274, 106 N. E. 885; *Cincinnati, Gas, etc., Co. v. Underwood* (1915), *post* 35, 107

N. E. 28. The evidence is sufficient to support each of the allegations of the complaint.

Under "Points and Authorities" in appellant's brief, no complaint is made of the trial court in the giving of any of the instructions that were

2. given by the court to the jury, nor in refusing any that were tendered by appellant. Therefore the error relied upon as to the giving of instructions Nos. 7 and 8 is waived. *Buffkin v. State* (1914), 182 Ind. 204, 106 N. E. 362; *Nashville, etc., R. Co. v. Johnson* (1916), *post*, 106 N. E. 414; *Smith v. Finney* (1914), 56 Ind. App. 93, 104 N. E. 887.

It is urged by appellant, that the amount of recovery is erroneous, being too large; the evidence is conflicting as to what appellee was to re-

3. ceive for his labor, and what he did actually receive from appellant from time to time. There is evidence in the record that appellee worked four different seasons for appellant, for three seasons he worked eight months each and the last season he worked for five months, and was to receive \$20 per month for all the time he worked; and there is evidence that he received the sum of \$160; the verdict was for \$420, and the evidence supports the same. It is therefore not excessive.

Error assigned in the overruling of the motion for judgment on the answers to interrogatories, notwithstanding the general verdict, presents

4. no question for review, as the record discloses that this motion was not ruled on by the trial court.

This leaves for consideration the overruling of the demurrer to the second paragraph of reply, which was addressed to the fourth paragraph of

5. answer. The reply pleads affirmative matter by which it seeks to avoid the legal effect of

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the fourth paragraph of answer. The case at bar was commenced on August 28, 1912, and there was no memorandum filed with the demurrer to the reply calling the trial court's attention to the infirmities now urged against it, which should have been done in order to present any question as to its sufficiency on appeal, by reason of the act of March 4, 1911. Acts 1911 p. 415, §344 Burns 1914; *Pittsburgh, etc., R. Co. v. Home Ins. Co.* (1915), 183 Ind. 355, 108 N. E., 525; *Quality Clothes Shop v. Keeney* (1915), 57 Ind. App. 500, 106 N. E. 541.

Finding no reversible error, judgment is affirmed.

NOTE.—Reported in 109 N. E. 418. Measure of damages for breach of an executory contract, see 42 Am. Dec. 48. See, also, under (1) 3 Cyc 348; (2) 3 Cyc 388; (4) 3 C. J. 890; 2 Cyc 713.

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### CULLMAN *v.* TERRE HAUTE, INDIANAPOLIS AND EASTERN TRACTION COMPANY.

[No. 8,592. Filed June 2, 1915. Rehearing denied October 14, 1915. Transfer denied November 19, 1915.]

1. STREET RAILROADS.—*Injuries to Persons on Streets.—Duty of Motorman.—Instructions.*—In an action for injuries sustained in a collision with an interurban car upon a public street, an instruction that “a motorman operating an interurban car upon a city street, and seeing a person driving \* \* \* parallel to the track \* \* \* and not within dangerous proximity thereto, has a right to presume that such person will exercise reasonable and ordinary care and will not drive upon the track when said car is in dangerous proximity”, and that “it is the duty of such motorman, if he sees such person approaching the track in a vehicle, to give warning of the approach of his car, if he has the time and opportunity in the exercise of ordinary care, and he may proceed without stopping the same upon the presumption that such person will not drive upon the track in front of his car when it is in dangerous proximity to said person and vehicle”, though incomplete and not strictly accurate, was not fatally erroneous in view of other instructions given. p. 188.
2. APPEAL.—*Review.—Consideration of Instructions.*—The instructions given by a trial court are to be construed in their entirety, and, when thus considered, if it appears that the jury was fully instructed on the issues, errors appearing on a consideration of the instructions in detached portions will be disregarded. p. 190.



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3. TRIAL.—*Instructions.—Incomplete Instructions.—Duty to Request Proper Instruction.*—Where it occurs to a party at the time of trial that an instruction omits certain matters that might properly be included therein, it is his duty to request a complete instruction. p. 191.
4. APPEAL.—*Review.—Harmless Error.—Incomplete Instruction.*—The omission of proper matter from an instruction given is harmless where other instructions cover the matter alleged to be omitted. p. 191.

From Superior Court of Marion County (84,349);  
*Charles J. Orbison*, Judge.

Action by Daniel Cullman against the Terre Haute, Indianapolis and Eastern Traction Company. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

*M. M. Bachelder*, for appellant.

*W. H. Latta*, for appellee.

IBACH, P. J.—This was an action to recover for personal injuries sustained by appellant in a collision between an automobile in which he was riding and one of appellee's interurban cars then being operated on a street in the city of Indianapolis. A trial of the case before a jury resulted in a verdict for appellee.

The only question presented on appeal is the correctness of the ruling of the trial court in refusing to grant appellant a new trial. Appellant's

1. only contention is that the giving of instruction No. 11 constitutes reversible error. This instruction reads as follows: "A motorman operating an interurban car upon a city street, and seeing a person driving in the street parallel to the track upon which the car is being operated, and not within dangerous proximity thereto, has a right to presume that such person will exercise reasonable and ordinary care and will not drive upon the track when said car is in dangerous proximity. It is the duty of such motorman, if he sees such person ap-

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proaching the track in a vehicle, to give warning of the approach of his car, if he has the time and opportunity in the exercise of ordinary care, and he may proceed without stopping the same upon the presumption that such person will not drive upon the track in front of his car when it is in dangerous proximity to said person and vehicle.”

Appellant contends that by giving such instruction the court invaded the province of the jury, that it was for the jury to determine whether when he saw the automobile approaching the track, the conditions and circumstances shown by the evidence were such as to require the motorman merely to sound an alarm and proceed, or whether they would require the motorman to immediately bring his car to a stand, or to check its speed so that he could prevent an injury in case the driver of the vehicle did not desist from his course. It may be conceded that the instruction complained of is not strictly accurate in all its parts, nor is it complete, and it is therefore subject to criticism, yet we are not inclined to hold that reversible error was committed by giving it. There is no serious objection by appellant to the first sentence of the instruction. The first clause of the second sentence places some duty on the motorman in the operation of his car, not all the duty required of him in all cases, but a general duty is presented, necessary to be exercised in cases of this character. This was not harmful to appellant. The second clause of the second sentence does not tell the jury that the motorman may proceed negligently, but simply that he may proceed on the assumption that a person will not drive in front of a moving street car when approaching in close proximity. It does not say that he may proceed without stopping after the person either gets into danger, or approaches so near to the moving

car as to be approaching danger. It rather furnishes to the jury a general statement of the motorman's right to proceed while a driver of a vehicle is traveling in the same street, parallel with the car, but not in such proximity as to make his place a dangerous one, until such time as something arose that would indicate to the motorman that such person was coming into danger. It is evident that the trial court intended that no other construction should be placed on this instruction, for in another the jury was told that street cars must be run with due regard to persons using the street, and that it is the duty of those managing an interurban car to exercise ordinary care. In another instruction the court said, "The motorman must be on constant watch for teams and automobiles turning upon the track and keep his car under such control as to be able to slacken speed or come to a stop should their safety seem reasonably to demand it," so that there was nothing in the instructions given including the one assailed limiting the rights of the jury, and by other instructions the duties of the motorman were particularly pointed out, when considered in connection with the facts assumed in the instructions with reference to the identical contingencies referred to by appellant.

It is settled by repeated decisions that the court's instructions are to be construed in their entirety and can not be held erroneous by considering detached portions, and when the instructions in this case are considered as a whole, we are satisfied that the jury was fully instructed on the facts and the issues, and the interpretation placed on the particular instruction attacked is not justified by the language of the instruction. Besides, if appellant concluded at the time of the trial that certain matters were omitted

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from the instruction, which might have been  
3. included therein, it was his duty to request such instruction, or that this one be amplified. Since, however, the court in other  
4. instructions included the same subject-matter which it is claimed is omitted from this one, he has not been harmed, and has no right to complain. Judgment affirmed.

NOTE.—Reported in 109 N. E. 52. On negligence of railroad company operating trains or cars longitudinally along public street as a question for the jury, see 49 L. R. A. (N. S.) 660. On the right of motorman to assume that no one will attempt to cross track so close in front of car as to render a collision probable, see 5 L. R. A. (N. S.) 1059. Duty of driver of street car to anticipate that person will attempt to cross track, see Ann. Cas. 1915 A 216. Duty of street railway to give notice of approach of car by sounding gong or bell, see 20 Ann. Cas. 152. See, also, under (1) 36 Cyc 1632; (2) 38 Cyc 1778; (3) 38 Cyc 1693; (4) 38 Cyc 1784.

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LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY  
COMPANY ET AL. v. W. H. MCINTYRE  
COMPANY.

[No. 8,565. Filed May 28, 1915. Rehearing denied October 6, 1915. Transfer denied November 19, 1915.]

1. APPEAL.—*Review.—Ruling on Demurrer.*—In an action against a railroad company for conversion by reason of the wrongful delivery of an automobile truck, where defendant's answers alleging matter in justification were probably insufficient as against a demurrer properly addressed thereto, the court did not err in overruling the demurrer to a reply to such answers, even though such reply was not a model pleading, where it contained sufficient averments to avoid the material allegations of such answers. p. 197.
2. CARRIERS.—*Carriage of Freight.—Wrongful Delivery.—Conversion.*—The delivery of freight without justification to a party other than the consignee is a wrongful conversion thereof; hence, under a bill of lading to the order of consignor with directions to notify a third person, the carrier, to avoid liability for delivery to such third person without the order or direction of consignor, must show justification for its act, and justification is not shown by the mere fact that the delivery was solely for inspection, especially where the bill of lading specifically provides against inspection. p. 198.

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3. **CONVERSION.—Justification.—Question of Fact.**—Efforts of a carrier of freight to justify its act in delivering to a third person contrary to the provisions of the bill of lading, by showing waiver or ratification, presented questions for the jury, where the facts were in dispute or were such as to which reasonable minds might differ. p. 200.
4. **CARRIERS.—Carriage of Freight.—Conversion.—Evidence.**—Where an automobile truck was shipped to the order of consignor with instructions to notify a third person, evidence showing that on the arrival of the truck at the destination a representative of the firm through whom the order was placed with the consignor, together with a representative of such third person, removed the truck from the car in which it was shipped, and induced defendant's agent to permit its removal from the premises upon their statement that such agent would receive a release from consignor during the day, warranted a finding that there had been an actual delivery contrary to the terms of the bill of lading, and without justification on the theory of a waiver of such terms, since the representative of the firm through whom the order was placed did not claim to have authority to waive the requirements of the bill of lading. p. 201.
5. **CARRIERS.—Carriage of Freight.—Wrongful Delivery.—Evidence.**—Where an automobile truck was shipped subject to consignor's order with instructions to notify a third person of its arrival, and the carrier delivered the truck to such third person in violation of the terms of the bill of lading, whereupon the consignor filed a claim against the carrier for the value of the truck on the theory of a conversion, and the evidence showed that the truck was incomplete in some equipments which were later furnished by the agency through whom the truck was ordered from consignor, that both such agency and the consignor sent men to adjust the truck and consignor furnished repairs for broken and defective parts, that the truck, eventually proving to be unsatisfactory, was returned to the carrier, who notified the consignor that it held the property subject to its order, and that the consignor refused to accept same and insisted on its claim for conversion, the questions of whether consignor ratified the delivery, or whether the carrier was justified in making the delivery, so as to preclude recovery in an action for conversion, were for the jury and its finding was conclusive. p. 202.
6. **CARRIERS.—Carriage of Freight.—Wrongful Delivery.—Liability.**—Where an automobile truck was shipped to consignor's order with instructions to notify a third person of its arrival, the carrier was not relieved from liability for its act in delivering the truck to such third person contrary to the terms of the contract of shipment by the fact that the consignor sent agents to make repairs to the truck while it was in the hands of such third person, where it appeared that consignor, upon learning of the wrongful delivery, presented its claim against the carrier and continued to press same with no intention of releasing the carrier from liability. p. 204.

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7. **CARRIERS.—***Carriage of Freight.—Delivery.*—Where shipment was made to consignor's order under a bill of lading stipulating for notice to the buyer, for delivery only on presentation of the bill, and against inspection, the carrier was not authorized to deliver the property to the buyer for inspection without the authority or consent of the consignor. p. 205.
8. **CARRIERS.—***Carriage of Freight.—Wrongful Delivery.—Instructions.*—Where a carrier delivered an automobile truck to the buyer in violation of the bill of lading under which the property was shipped to consignor's order with instructions to notify the buyer, and which stipulated for the presentation of the bill of lading before delivery, and against the right of inspection, an instruction requested by the carrier, in an action against it for conversion because of such wrongful delivery, stating that since the contract of purchase did not provide the time of payment the same would become due upon delivery of the truck in good repair and running order, was properly refused, since it not only contradicted the stipulations of the bill of lading and stated no legal proposition to justify the delivery, but it also assumed facts not proved and was inapplicable to the evidence. p. 205.
9. **APPEAL.—***Review.—Refusal of Instructions.*—There is no reversible error in the refusal of instructions, where every element of the case is shown to have been fully covered and properly presented by the instructions given. p. 206.
10. **CONVERSION.—***Excessive Damages.—Review.*—In an action against a carrier for conversion through the wrongful delivery of an automobile truck, where there was evidence, though conflicting, to show that the truck was worth \$712.50, together with other evidence properly for the consideration of the jury in determining the amount of recovery, a verdict for \$700 was not such as to convince the court that the jury acted from prejudice, partiality or corruption, and therefore could not be disturbed on the ground that it was excessive. p. 207.

From Steuben Circuit Court; *Frank M. Powers*, Judge.

Action by the W. H. McIntyre Company against the Lake Shore and Michigan Southern Railway Company and another. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

*Walter Olds, F. B. Carpenter* and *A. C. Wood*, for appellants.

*P. V. Hoffman* and *Brown & Carlin*, for appellee.

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SHEA, C. J.—Appellee, a manufacturer of automobiles and automobile delivery trucks, at Auburn, Indiana, shipped over appellants' lines an automobile delivery truck from Auburn, Indiana, to Valparaiso, Indiana, which was consigned by bill of lading to appellee's order, notify Lowenstein & Sons at Valparaiso, and drew a sight draft on the latter for \$712.50, with bill of lading attached, said bill of lading providing for delivery only on surrender of bill of lading. It is alleged in the complaint that delivery was made by appellants without payment of the draft, or surrender of the bill of lading, and recovery of the value of the truck is sought in this action as for a wrongful conversion of property. The material parts of the bill of lading, attached to and made part of the complaint read as follows:

“Order Bill of Lading—Original Agent's No. . . . . Received, subject to the classifications and tariffs in effect on the date of issue of this original bill of lading at Auburn, Ind., from W. H. McIntyre Co., the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown) marked, consigned, and destined as indicated below, which said company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof and which are agreed to by the shipper and ac-



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cepted for himself and his assignees. The surrender of this original order bill of lading properly indorsed shall be required before the delivery of the property. Inspection of property covered by this bill of lading will not be permitted unless provided by law or unless permission is endorsed on this original bill of lading or given in writing by the shipper.

\* \* \* (Mail address—Not for purpose of delivery.) Consigned to order of W. H. McIntyre Co. Destination—Valparaiso; State of Ind., County of \* \* \*. Notify Lowenstein & Sons at \* \* \* .”

Appellants answered the complaint in seven paragraphs, the first a general denial, and appellee filed a reply in two paragraphs, the first a general denial. The court overruled appellants' demurrer to appellee's second paragraph of reply to the second, third and sixth paragraphs of appellants' answer. The paragraphs of answer to which the reply is addressed, allege, in substance, that Lowenstein & Sons had contracted with the Security Automobile Company of Chicago, for the truck; that the Security Automobile Company was agent of appellee and handled its autos; that Lowenstein & Sons ordered a truck from the Security Automobile Company, and it ordered the truck from appellee; that the contract for the truck required certain equipment which did not accompany the shipment; that the truck was not to be shipped with draft attached, but was to be delivered overland and inspected so as to know it would operate in accordance with the contract; that the Security Automobile Company and Lowenstein & Sons demanded inspection of the wagon before paying the draft; that they were entitled to an inspection of it, and the only way an inspection could be made to de-

termine whether it was in accordance with the contract, was by putting the same together and testing and ascertaining whether it was in running order, and would carry the load guaranteed; that appellants allowed the Security Automobile Company, and Lowenstein & Sons to take it from the car for inspection, and they ascertained it did not comply with the contract, and could not, and would not run and be operated; that while it was being so tested appellee furnished its own employes to repair same, had work done upon it for the purpose of endeavoring to make it in accordance with the contract of purchase, and took parts of said motor delivery wagon back, and has ever since retained them, and furnished new parts to the same, acquiescing in and consenting to the inspection of the same, and testing of it, and, failing to complete it in accordance with the contract, it was returned to appellants and held subject to appellee's order.

The second paragraph of appellee's reply to which appellants' demurrer was overruled, alleges that the Security Automobile Company of Chicago, was engaged in the purchase and sale of automobiles. Prior to the shipment of the truck, it entered into a written contract to furnish Lowenstein & Sons a truck, the terms of which contract were not known to appellee, and to fill the order, it ordered of appellee the truck in question by written contract, a copy of which is set out with the reply. It then sets out the terms of the bill of lading, with reference to delivery, and the delivering of it in violation of the terms, and thereupon appellee demanded payment; that while the motor truck was in the possession of the parties under such wrongful delivery, and after appellee had filed its claim with appellants for the value of the truck, and was duly prosecuting said claim, it did, upon one or two occasions,

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upon the request of the Security Automobile Company and Lowenstein & Sons send mechanics from its shops to repair and replace broken parts of the truck, as the special warranty in the contract between it and the Security Automobile Company required it to do, and such parts were taken from the factory to repair the machine, and the broken parts returned for inspection to enable appellee to determine if it was liable under such warranty; that such repairs were made without any intention on appellee's part of waiving or abandoning its claim against appellants for the wrongful delivery of the motor wagon, of which intention appellants had due notice during all of said time; that whatever was done by appellee in making such repairs ensued to the benefit of appellants in the way of being an effort to get Lowenstein & Sons to accept said wagon and pay for it and relieve appellants from liability upon said wrongful delivery.

Over appellants' motion for a new trial judgment was rendered in appellee's favor for \$700.

The errors assigned and argued by appellants are the overruling of their demurrer to the second paragraph of reply addressed to the second, third and sixth paragraphs of appellants' answer, and the overruling of their motion for a new trial.

It is earnestly argued that the court erred in overruling appellants' demurrer to appellee's second paragraph of reply. The second, third and sixth

1. paragraphs of appellants' answer to the complaint, to which this paragraph of reply is addressed, are based upon the theory that Lowenstein & Sons had the right of inspection in the first instance; that if, upon inspection, they found the machine to be unsatisfactory, they might return it. We doubt whether these paragraphs of answer were sufficient as against a demurrer properly addressed there-

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to. At all events, the second paragraph of reply thereto, while by no means a model pleading, contained sufficient averments to avoid the material allegations of said paragraphs of answer.

The determination of a few questions will dispose of the many questions ably presented by counsel in their briefs in support of the contention that

2. the court erred in overruling the motion for a new trial. The theory upon which the judgment and verdict rests is that there was a wrongful conversion of the property by appellants, and therefore they are liable for the value thereof. The bill of lading heretofore referred to contains the provision that "The surrender of this bill of lading properly indorsed, shall be required before delivery of the property. Inspection of property covered by this bill of lading will not be permitted unless permission is endorsed on this original bill of lading, or given in writing by the shipper \* \* \* notify Lowenstein & Sons." While there is some conflict in the decided cases, which we do not attempt to reconcile, the great weight of authority sustains the doctrine that the delivery of property without justification, to a party other than the consignee, is a wrongful conversion thereof. The decisions of our own court, as well as many others adhere to this principle. *Merchants, etc., Co. v. Merriam* (1887), 111 Ind. 5, 11 N. E. 954; *Cleveland, etc., R. Co. v. Wright* (1900), 25 Ind. App. 525, 58 N. E. 559; *Chicago, etc., R. Co. v. Fifth Nat. Bank* (1901), 26 Ind. App. 600, 605, 59 N. E. 43; 1 Hutchinson, Carriers (3d ed.) §177; *North Pennsylvania R. Co. v. Commercial Nat. Bank* (1887), 123 U. S. 727, 8 Sup. Ct. 266, 31 L. Ed. 287; *Merchants Bank v. Union R., etc., Co.* (1877), 69 N. Y. 373; *Dows v. National Exchange Bank* (1875), 91 U. S. 618, 23 L. Ed. 214; *Hieskell v. Farmers, etc., Nat. Bank* (1879), 89 Pa.

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St. 155, 33 Am. Rep. 745; *Southern R. Co. v. Webb* (1904), 143 Ala. 304, 313, 39 South. 262, 111 Am. St. 45, 5 Ann. Cas. 97; *Watson v. Hoosac Tunnel Line Co.* (1883), 13 Mo. App. 263; *Libby v. Ingalls* (1878), 124 Mass. 503; 6 Cyc 470.

In 4 Elliott, Railroads §1427 this language is found: "A direction in a bill of lading to consignor's order to 'notify' some one else, does not warrant the carrier in delivering the property to the person so to be notified without the production of the bill of lading. The use of the term 'notify' shows that the party to be notified was not intended as the consignee, but was simply to be advised of the arrival of the goods. The fact that a bill of lading is made out to the consignor's order makes this still plainer. Indeed, it has been held that such a contract is so plain and unambiguous that a custom in a certain city to deliver property under similar bills of lading to the person to be notified can not be shown." Citing numerous authorities. The principle is also well supported in the following cases and notes thereto: *Richmond, etc., R. Co. v. Payne* (1890), 6 L. R. A. 849, 853; *Pacific Express Co. v. Shearer* (1896), 37 L. R. A. 177; *Nebraska Meal Mills v. St. Louis, etc., R. Co.* (1897), 38 L. R. A. 358. So that we conclude that if there was a delivery to a person other than the consignee, which is undisputed in this case, in order to escape liability the appellants must justify their acts. The following cases sustain this principle. *American Express Co. v. Greenhalgh* (1875), 80 Ill. 68; *Gilkinson v. The Scotland* (1859), 14 La. Ann. 417; *Wilcox v. Chicago, etc., R. Co.* (1877), 24 Minn. 269; *Wolfe v. Missouri Pac. R. Co.* (1888), 97 Mo. 473; 11 S. W. 49, 10 Am. St. 331, 3 L. R. A. 539; *Atchison, etc., R. Co. v. Schriver* (1906), 72 Kan. 550, 84 Pac. 119, 4 L. R.

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A. (N. S.) 1056; *Libby v. Ingalls, supra*; *National Bank v. Atlanta, etc., R. Co.* (1886), 25 S. C. 216.

In order to justify their acts, appellants earnestly argue that there was not a delivery of the property within the meaning of the law, but that an opportunity was simply given for an inspection of the truck by the party to whom notice of its arrival at Valparaiso was directed to be given; that it was necessary, in order to properly inspect said machine to remove it from the premises of appellant, and test it by use. It must be remembered that Lowenstein & Sons, to whom said notice was to be sent, were not the consignees. It has been held that the carrier was not authorized to deliver property to the person to whom notice was to be given, contrary to the terms of the bill of lading, and a delivery so made, is a wrongful conversion of property, unless justified. We see no reason why the same rule should not apply when parties are given the privilege of inspection, where it is especially prohibited by the bill of lading, as in this case. Our attention has been called to no case holding a contrary doctrine, and a diligent investigation has disclosed none. Many cases are cited by appellants' learned counsel which hold that privilege of inspection given by the carrier to the consignee named in the bill of lading, was not wrongful conversion, but none of them go so far as to hold that said right to inspect is given the party to be notified, who is not the consignee, where the bill of lading denies the right of inspection, even to the consignee, unless he fulfills its requirements. Efforts to justify

3. appellants' acts by showing, or attempting to show, waiver or ratification, where the facts are in dispute, or where reasonable minds might differ, present questions of fact to be determined by the jury.

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The facts in this case, as we view them, warrant a finding that there was an actual delivery. The evidence discloses that after the truck arrived  
4. at Valparaiso, a representative of the Security Automobile Company, together with one of Lowenstein & Sons went to the station and removed the truck from appellants' car, in which it was shipped, and induced the agent of appellants to permit them to remove the truck from the premises of appellants upon the statement made, as he testifies, that he would receive a release from appellee during the day; that it had been arranged for by letter or phone, so that the delivery was not made for the purpose of inspection, but upon the theory that it had been released by the owner and consignee. This evidence is not seriously controverted.

It is further argued that the employe of the Security Automobile Company had a right to direct the release of the truck, because the Security Automobile Company was the general agent of appellee, with power to so direct, and that therefore there was an informal waiver of the terms of the bill of lading by the agent of appellee, who had such authority. So far as the evidence in this case shows, said agent of the Security Automobile Company did not pretend to have such right, but as heretofore stated, based his request for release of the truck wholly upon the truth of the statement of the Security Automobile Company that it had been released as above stated. These facts uphold a finding that the truck was delivered without sufficient justification in so far as the question of waiver is presented. It is held in the case of *Sawyer v. Chicago, etc., R. Co.* (1868), 22 Wis. 403, 99 Am. Dec. 49, that when goods are shipped to the order of the consignor, the carrier will not be justified in delivering them without such order, by the fact that one of



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the employes of the shipper said the property was for a certain person. See, also, *Wilson Sewing Mach. Co. v. Louisville, etc., R. Co.* (1879), 71 Mo. 203; *Pennsylvania R. Co. v. Stern* (1888), 119 Pa. St. 24, 12 Atl. 756, 4 Am. St. 626.

It is also earnestly insisted that appellee ratified the delivery to Lowenstein & Sons by subsequent conduct; that a representative was sent from

5. appellee's shops at Auburn, to adjust certain parts of the oiling device and supply certain omitted parts, as well as new parts for the engine, which were broken by the demonstrator. A brief statement of the facts disclosed by the evidence will throw some light on the questions of waiver and ratification. Appellee was engaged in the manufacture of motor cars at Auburn, Indiana. The Security Automobile Company was a corporation engaged in selling and distributing automobiles with its place of business at Chicago. It is claimed by appellants that the Security Automobile Company was the general agent of appellee in the sale of cars. This is denied by appellee. The Security Automobile Company negotiated the sale of an auto truck or delivery wagon to Lowenstein & Sons, at Valparaiso, for the sum of \$950, which truck was ordered by the Security Automobile Company from appellee, to be delivered, it is claimed, overland at Valparaiso. The truck was shipped by freight over appellants' railroad, the Lake Shore and Michigan Southern being the initial carrier, consigned to appellee. A sight draft was attached to the bill of lading, which contained directions that the truck should not be delivered or inspected without presentation of bill of lading, or release in writing. The agent of appellant, the Chicago and St. Louis Railroad Company, at Valparaiso, the final carrier, was induced by representations made to him by Low-

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enstein & Sons and an employe of the Security Automobile Company, to turn the truck over to them without presentation of bill of lading, or release. On June 1, 1910, immediately upon discovering that the truck had been so turned over without presentation of bill of lading, appellee filed claim against appellants for the value of the car, charging it with wrongful conversion, and has continually insisted on settlement from appellants, as the evidence discloses. The truck was incomplete in some equipments about which there was no dispute. Other parts claimed to be defective or incomplete, appellee claims he was not obliged to furnish. These parts were actually furnished by the Security Automobile Company. The contract between Lowenstein & Sons and the Security Automobile Company, and the contract between appellee and the Security Automobile Company are not identical in some details, but for our purpose we need not give consideration thereto except that both contracts contained a special limited warranty in the same language. By the terms of the warranty contained in the contract between appellee W. H. McIntyre Company and the Security Automobile Company, the former was required to furnish and replace all defective parts within ninety days from date of shipment. Both appellee and the Security Automobile Company sent men to Valparaiso to adjust it, and appellee furnished various parts of the truck from its factory, to supply parts omitted or parts broken in attempts to use it, all, it is claimed by appellee, at the request of Lowenstein & Sons, as well as appellee, and because of the fact that by the terms of the contract of sale appellee was required to supply all defective parts within ninety days after shipment. The truck was unsatisfactory, and after several weeks Lowenstein & Sons returned it to

appellants, who notified appellee that they held it subject to its order. Appellee refused to accept the truck, and insisted upon its claim for wrongful conversion, and proceeded to file this suit. Whether upon these facts appellants were justified in delivering the truck as stated, was properly submitted to the jury, and decided adversely to appellants. This court can not decide otherwise as matter of law.

It is argued that the court erred in giving to the jury instruction No. 4 requested by appellee. This

instruction reads as follows: "If you find from

6. the evidence that after the delivery wagon was in the possession of Lowenstein & Sons, the plaintiff did send such mechanics to Valparaiso, at the request of Lowenstein & Sons, or the Security Automobile Company, or its agents, to make repairs upon said machine in order to induce said Lowenstein & Sons to accept such machine and pay for it, and that such repairs were made and broken parts returned to factory, such acts of plaintiff would not alone in and of themselves be sufficient to release the defendants from any wrongful delivery, if the plaintiff, as soon as it discovered such wrongful delivery, made claim upon defendants for the value of such machine because of such wrongful delivery, and kept on pressing its claim against defendants and without at any time intending to release defendants from such claim." We see no objection to this instruction as it clearly states the fact that if appellee sent its man to make needed repairs and adjustments in the truck at the request of Lowenstein & Sons, that was not alone sufficient to release defendants from wrongful delivery, if as soon as appellee discovered the wrongful delivery, its claim against appellants was presented and pressed continuously with no intention of releasing said defendants from liability. There are

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other elements which enter into the consideration of the question. This states the law as the court understands it.

Instruction No. 5 given at appellee's request and objected to, reads as follows: "Under the terms of the bill of lading under which such delivery

7. wagon was shipped, the defendants were not authorized to deliver such wagon to Lowenstein & Sons for inspection without the production of the bill of lading with such permission endorsed upon it or without written authority from the plaintiff, or without plaintiff's consent." This instruction states the law correctly, following the authorities hereinbefore cited.

Instructions Nos. 6 and 11 tendered by appellee also go to the question of inspection and delivery, and are in harmony with the law as herein announced. No error was committed in giving them to the jury.

Error is also predicated upon the refusal of the court to give instruction No. 5 requested by appellant. This instruction contains the fol-

8. lowing language; "the order and contract of purchase not providing the time of payment, the payment would become due and payable upon the delivery of the motor delivery wagon in good repair and running order." This statement in the instruction is in contradiction of the stipulations of the bill of lading, and the abstract proposition of law stated could not justify the delivery of the property in violation of its terms. It is also objectionable because it incorrectly assumes that the Security Automobile Company was entitled to a part of the \$712.50, for which amount the draft was drawn, as commission, whereas the evidence shows that the list price of the car was \$950, and that the Security Automobile Company was entitled to twenty-five per

cent of that amount for commission. Twenty-five per cent of that amount would be \$237.50, which, deducted from \$950, leaves the exact amount, to wit, \$712.50, due appellee for said car, in which the Security Automobile Company had no interest. It is also objectionable for the reason that it is not applicable to the evidence, as the representative of the Security Automobile Company at the time the car was turned over to Mr. Lowenstein and himself made no representation that he was the agent for appellee, or had any authority to release the truck, and the truck was not released upon that theory. No error was committed in refusal to give this instruction.

Instructions Nos. 14 and 25 are based upon the theory that the purchaser had the right of inspection, notwithstanding the terms of the bill of lading, and are therefore erroneous and were rightly refused. No harmful error can be predicated on the refusal of the court to give instructions Nos. 17, 18 and 19 tendered by appellants, which went to the question of special warranty. Instruction No. 21 tendered by appellants and refused by the court reads as follows: "The taking possession of parts of the motor vehicle delivery wagon by the plaintiff after the delivery of the same by the defendants to the Security Automobile Company, or to Lowenstein & Sons, and retaining the same by the plaintiff would constitute a ratification of the delivery by the defendants, and if you find such to be the facts, then there can be no recovery by the plaintiff." This instruction goes to the question of

ratification. This branch of the case was

9. fully covered by instruction No. 8 tendered by appellants, and given by the court, therefore no error can be predicated on the refusal to give this instruction. An examination of the in-

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structions given by the court will disclose that every element of the case was fully covered and properly presented to the jury, so that no error can be predicated upon the refusal to give any of the instructions complained of.

It is further argued that the damages awarded are excessive. There was evidence that the car was worth \$712.50. There was sharp conflict 10. in the evidence upon this proposition. Evidence was heard as to the return of certain parts, of new parts being attached to the machine, and parts that were broken being supplied, and that when so repaired and adjusted, it was still unsatisfactory. All these facts were for the consideration of the jury in determining the amount of recovery. Under the well-settled rule that a verdict will not be set aside on the ground that the damages awarded are excessive, where the amount is not such as to induce the court to believe that the jury acted from prejudice, partiality or corruption, we can not say that the amount of recovery was excessive. *Joseph E. Lay Co. v. Mendenhall* (1913), 54 Ind. App. 342, 348, 102 N. E. 974. It would needlessly lengthen this opinion to consider other incidental and collateral questions ably argued in appellants' brief. It is sufficient to say that we have examined them and find no error which would warrant this court in reversing the judgment below. Judgment affirmed.

NOTE.—Reported in 108 N. E. 978. Liability of carrier for delivery of freight to wrong person, see 9 Am. St. 511; 5 Ann. Cas. 100. See, also, under (1) 31 Cyc 338; (2, 6) 6 Cyc 470; (3) 38 Cyc 2107; (8) 38 Cyc 1617, 1657; (9) 38 Cyc 1711; (10) 3 Cyc 380, 381.

## PALMER v. BEALL ET AL.

[No. 8,738. Filed November 19, 1915.]

APPEAL.—*Insufficient Briefs.—Dismissal.*—Where a number of errors were assigned, appellant's brief, which under "points and authorities" contained a number of general propositions that might have been applicable to one or more of the rulings assigned as error, without any reference or effort to apply such propositions to any error assigned, was insufficient under clause 5 of Rule 22 to present any question, and necessitated a dismissal.

From Delaware Superior Court; *Robert M. Van Atta*, Judge.

Action by Lloyd Beall and others against George W. Palmer. From a judgment for plaintiffs, the defendant appeals. *Appeal dismissed.*

*F. F. McClellan, D. D. Hensel and L. A. Guthrie*, for appellant.

*Rollin Warner and Everett Warner*, for appellees.

HOTTEL, J.—This is an appeal from a judgment in appellees' favor in an action brought by them in the court below against appellant to replevin corn and for damages for its detention.

In this court there are ten errors assigned including the one challenging the ruling of the trial court on the motion for new trial. The motion for new trial contains sixteen separate grounds or reasons therefor. In his brief, under the heading "Points and Authorities", appellant states thirteen general propositions which may have some application to one or more of the rulings assigned as error, and intended to be relied on for reversal, but no reference is made to any particular error so assigned and relied on and no effort is made to apply the propositions stated to any of such errors. This is not a compliance with clause 5 of Rule 22 of the Supreme Court and this court. *Leach v. State* (1912), 177 Ind. 234, 240, 97 N. E. 792; *Pittsburgh, etc., R. Co. v.*



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*Lighthaiser* (1907), 168 Ind. 438, 460, 78 N. E. 1033; *Inland Steel Co. v. Smith* (1907), 168 Ind. 245, 252, 80 N. E. 538; *Chicago, etc., R. Co. v. Dinius* (1913), 180 Ind. 596, 626, 103 N. E. 652; *Weidenhammer v. State* (1914), 181 Ind. 349, 350, 103 N. E. 413, 104 N. E. 577; *Michael v. State* (1912), 178 Ind. 676, 678, 679, 99 N. E. 788; *Anderson v. State* (1913) 179 Ind. 590, 101 N. E. 84; *Curry v. City of Evansville* (1914), 56 Ind. App. 143, 104 N. E. 978; *Mutual Life Ins. Co. v. Finkelstein* (1915), 58 Ind. App. 27, 107 N. E. 557; *Town of Newpoint v. Cleveland, etc., R. Co.* (1915), 59 Ind. App. 147, 107 N. E. 560; *German Fire Ins. Co. v. Zonker* (1915), 57 Ind. App. 696, 108 N. E. 160. "Mere abstract statements of law or fact, or both, unless applied specifically to some particular ruling or action of the court, although contained in appellant's statement of points, present no question." *Leach v. State, supra*. See, also, other cases cited, *supra*.

Other infirmities in appellant's brief are suggested by appellees, but the one indicated, under the authorities, *supra*, prevents a consideration of any of the errors relied on for reversal, and authorizes a dismissal of the appeal. Appeal dismissed.

NOTE.—Reported in 110 N. E. 218. See, also, 3 C. J. 1428; 2 Cyc 1016.

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## McDERMOTT v. BOARD OF COMMISSIONERS OF THE COUNTY OF DELAWARE, ET AL.

[No. 8,812. Filed November 19, 1915.]

1. COUNTIES.—*Board of County Commissioners.—Liability for Negligence.*—A county, being an involuntary *quasi* corporation created by the sovereign power of the State for governmental purposes and whose functions are to be performed solely as provided by law, is not liable for the negligence of its officers in the absence of statute creating liability, and the negligent failure of a board of

county commissioners to keep the courthouse steps in proper condition, resulting in injury to a person attempting to use same, forms no exception to the rule, notwithstanding §5989 Burns 1914, §5748 R. S. 1881, which requires such boards to keep the public buildings in repair, since such statute imposes no liability for failure so to do. p. 212.

2. NEGLIGENCE.—*Wilful Injury*.—Acts or omissions complained of can not be both negligent and wilful, since to constitute a wilful injury the act or omission which produced it must have been intentionally committed or omitted under such circumstances as to evince a reckless disregard for the safety of others and a willingness to inflict the injury. p. 215.

3. COUNTIES.—*Board of County Commissioners*.—*Negligence*.—*Individual Liability*.—The board of county commissioners acts for and represents the county and is an entity for the performance of the business falling within the statutory scope of its duties, and its failure to discharge a duty is nonfeasance in office for which the county is not liable; and, aside from the privity of relation which individual members of the board bear to the county by reason of being officers charged with the performance of prescribed duties, their relation to the county is the same as that of any other inhabitant, neither conferring greater authority nor imposing additional responsibility; hence, though it is the statutory duty of the board of county commissioners to keep the public buildings in repair, the negligent failure of the board to do so will not render the members individually liable to one injured by reason of such omission. p. 215.

From Delaware Circuit Court; *William A. Thompson*, Judge *Pro Tem*.

Action by Carrie McDermott against the Board of Commissioners of the County of Delaware and others. From a judgment for defendants, the plaintiff appeals. *Affirmed*.

*John T. Meredith*, for appellant.

*Ralph S. Gregory*, for appellees.

MORAN, J.—This action was brought by appellant against appellees, the Board of Commissioners of the County of Delaware, Indiana, and the individual members thereof, for personal injuries sustained by appellant, which she alleges she suffered by reason of a fall upon defective stone steps, which led to and from the second story of the courthouse in the city

of Muncie, Indiana, upon which it is alleged appellees negligently permitted ice and snow to accumulate. Appellees filed separate demurrers to the complaint, which were sustained, and upon failure to plead further, judgment was rendered against appellant that she take nothing by her complaint and that appellees recover costs. From this judgment an appeal has been taken.

The only question involved is whether appellees are liable under the law to appellant for the injuries suffered in the manner alleged in the complaint. After alleging the location of the courthouse in the city of Muncie, Indiana, and that appellees, William T. Janney, John B. Jackson and William Sunderland, were on January 9, 1912, the qualified and acting commissioners of the county, the complaint further alleges in substance that on the east side of the courthouse leading up to it were stone steps, which it was the duty of appellees to maintain and keep in repair, and which formed the only approach to the courthouse from the east; the stone steps were carelessly, negligently and wilfully allowed and permitted by appellees to be and become and remain out of repair in that all except the top one were broken in two near the middle and slanted downward, and became coated with a slick covering of ice and snow, which appellees negligently and wilfully allowed to accumulate upon the steps to a depth of three or four feet, leaving but a narrow passageway about two feet wide up and down the middle thereof, all of which was known to appellees. On January 9, 1912, appellant while attempting to descend the steps, not knowing of the dangerous and unsafe condition thereof, and exercising due care, slipped and fell, from which she suffered a severe injury to her damage in the sum of \$10,000.

The law seems to be well settled as a general proposition that a county is not liable any more than a state would be liable for the negligence

1. of its agents or officers, in the absence of a statute creating liability. *Board, etc. v. Daily* (1892), 132 Ind. 73, 31 N. E. 531; *White v. Board, etc.* (1891), 129 Ind. 396, 28 N. E. 846; *Smith v. Board, etc.* (1892), 131 Ind. 116, 30 N. E. 949; *Morris v. Board, etc.* (1892), 131 Ind. 285, 31 N. E. 77; *Board, etc. v. Allman* (1895), 142 Ind. 573, 42 N. E. 206; *State, ex rel. v. Board, etc.* (1908), 170 Ind. 595, 85 N. E. 513; *State, ex rel. v. Goldthait* (1909), 172 Ind. 210, 87 N. E. 133; *Talbott v. Board, etc.* (1908), 42 Ind. App. 198, 85 N. E. 376.

Appellant admits that it has been held in this jurisdiction that a county is not liable to an individual for the negligence of its officers, but insists that the authorities so holding are limited to the facts in the particular cases, and that to hold so absolutely is a harsh rule, unsound and without foundation in justice; that the rule should not be extended, and that by narrowing its application, the case at bar will not fall within the general rule; that §5989 Burns 1914, §5748 R. S. 1881, which provides that a county shall keep all public buildings of the county in repair, supports her contention and creates liability under the facts pleaded in the case at bar.

We address our attention to a review of the principle underlying the authorities, holding generally that a county is not liable for the negligent acts or omissions of its agents and officers, charged with the duty of transacting its business, in response to appellant's very earnest argument that we do so. A county may be termed a *quasi* corporation with corporate capacity for specific ends; being involuntary in that its creation is without the consent or con-

currence of its inhabitants, but by the sovereign power of the State for governmental purposes. Its corporate functions are to be performed in the manner provided by law. *State, ex rel. v. Goldthait, supra*; *State, ex rel. v. Hart* (1896), 144 Ind. 107, 43 N. E. 7, 33 L. R. A. 118; 7 R. C. L. 924, 936; *Stevens v. St. Mary's Training School* (1893), 144 Ill. 336, 32 N. E. 962, 36 Am. St. 438, 18 L. R. A. 832; *Board, etc. v. Daily, supra*; *Board, etc. v. Allman, supra*. The statute referred to by appellant has been in force since May 6, 1863, and adds no support to her contention, as the statute enjoins the duty on the board of commissioners to keep the public buildings of the county in repair without creating liability for failing so to do; hence, appellant's right of action, if one exists, as set forth in her complaint, is independent of statute.

As to the foundation upon which rests the legal proposition that a county is not liable for the negligent acts of its agents and officers, nothing can be added to the language found in 7 R. C. L. 955, 956: "The principal ground upon which it is held that counties are not liable for damages in actions for their neglect of public duty is that they are involuntary political divisions of the state, created for governmental purposes, and are organized without regard to the consent or dissent of the inhabitants. \* \* \*. Another reason is that since a county is but a political subdivision of the state, a suit against the county is, in effect, a suit against the state, and that therefore an action will not lie without the consent of the legislature."

The duties of a board of commissioners are public in their nature. The service it performs is for the public, from whence members thereof receive their emoluments, and it is not answerable to an individual for its negligent acts, "A breach of duty by a

county under this line of reasoning creates a liability to the state only, on account of which an offending county may be amenable to a public action by indictment, but not at the suit of an individual \* \* \* ." 4 R. C. L. 226. In the case of *Board, etc. v. Daily, supra*, it was held that the county was not liable for a personal injury occasioned by reason of the negligence of the board of commissioners in caring for and controlling the courthouse, but recognized that a distinction existed in this State between the duties imposed as to the care and management of public buildings and that of public bridges, but added that the weight of authority was against holding a county liable for injuries occurring by reason of the failure of the county to keep the public bridges in repair. Following this decision, the case of the *Board, etc. v. Allman, supra*, reached the Supreme Court, which was an action against the county to recover for the death of a person caused by a defective approach to a bridge over a watercourse, and as aforesaid the courts had prior, to this time recognized liability on the part of the county, when injuries occurred by reason of the county negligently failing to keep the bridges in proper repair. By this decision it was laid down generally in overruling many of the earlier decisions that a county was not liable for the negligent conduct of its officer and servants, placing it upon the broad ground that the county is a subdivision of the State and as such is an instrumentality of government, exercising the authority given by the State and no more liable for the acts or omissions of its officers than the State. The facts alleged in the case at bar bring it within the reasoning applied in the Allman case, *supra*, and we find no criticism of the principle there announced, but on the contrary the greater weight

of current authority supports this principle. No error was committed in sustaining the demurrer of the board of commissioners to the complaint.

This leaves for consideration the question as to whether the individual members of the board of commissioners are liable under the facts

2. alleged in the complaint. The complaint in addition to characterizing the acts omitted to have been done on the part of appellees as being negligent, also states that the acts were wilfully omitted. The acts alleged to have been omitted by appellees could not have been both negligent-

3. ly and wilfully omitted, as negligence and wilfulness are incompatible. To constitute a charge of wilful injury, the act or acts which produced the injury must have been intentionally omitted or omitted to have been done under such circumstances as to evince a reckless disregard for the safety of others and a willingness to inflict the injury. The general tenor and scope of the complaint discloses that it proceeds upon negligence; it does not disclose an intentional omission to perform a duty. *Vandalia R. Co. v. Clem* (1911), 49 Ind. App. 94, 96 N. E. 789; *Barrett v. Cleveland, etc., R. Co.* (1911), 48 Ind. App. 668, 96 N. E. 490; *City of Union City v. Murphy* (1911), 176 Ind. 597, 96 N. E. 584. The charge here is not that the individual members of the board of commissioners of Delaware County negligently performed a duty, and out of the negligent performance the injury to appellant arose; the charge is that they negligently failed to perform a duty. The board of commissioners acts for and represents the county, and as some authorities hold, is the county. 11 Cyc 388; *Platter v. Board, etc.* (1885), 103 Ind. 360, 2 N. E. 544; *State, ex rel. v. Clark* (1853), 4 Ind. 315; *Patton v. Board, etc.* (1884), 96 Ind. 131; *Hoffman v.*



*Board, etc.* (1884), 96 Ind. 84. The board is an entity for the performance of the business that falls within the statutory scope of its duty, and among the many duties that fall to its lot is to keep the public buildings of the county in repair. The failure to do so is nonfeasance of public officers, but as we have seen, by reason of the nature of the corporation, which the board represents, the county is not liable for the failure of the board to perform its duty. Outside of the privity of relation that the individual members of the board of commissioners bear to the county by reason of being officers charged with the performance of prescribed duties, their relations are the same as that of any other inhabitant of the county, with no additional authority, nor charged with any additional responsibility. Now where the entity, made up of three resident voters of the county, styled the board of commissioners, and holding their offices by virtue of an election, fails as such to discharge a duty it owes to the public, Can the individual members be held liable to an individual, who is injured by the nonfeasance of the board? It may be stated generally that members of a corporate body, such as the board of commissioners, upon which a duty rests, can not be held liable for the neglect of duty of the body, and a refusal to perform a duty is the refusal of the body and not the individuals comprising it; and, being an official duty, it is owing to the public and not to the citizens distributively. 5 Thompson, Negligence (2d ed.) §6402; *Monnier v. Godbold* (1906), 116 La. 165, 40 South. 604, 5 L. R. A. (N. S.) 463; *Packard v. Voltz* (1895), 94 Iowa 277, 62 N. W. 757, 58 Am. St. 396; *Hydraulic Press Brick Co. v. School District* (1899), 79 Mo. App. 665; *Bassett v. Fish* (1878), 75 N. Y. 303; *Bates v. Horner* (1893), 65 Vt. 471, 27 Atl. 134, 22 L. R. A. 824; 2 Shearman & Red-

field, Negligence (6th ed.) §340a; 2 Cooley, Torts (3d ed.) 756; *Daniels v. Hathaway* (1892), 65 Vt. 247, 26 Atl. 970, 21 L. R. A. 377. In *Bassett v. Fish*, *supra*, it was held that school trustees act as a corporate body and not as individuals, but if any of the members "had done a wrongful act, wilfully or negligently, upon the premises of the district, from whence injury came to the teacher or scholar, he would ordinarily be liable; but not because he was a trustee or a member of the board of education, but because he was the person doing the act." And in *Hydraulic Press Brick Co. v. School District*, *supra*, it was held that where the school corporation failed to take a bond from an original contractor, and loss resulted thereby, that the school directors were not individually liable, as they did not act as individuals in the enterprise of erecting the school building, but as a board, and to hold otherwise would be to establish a harsh rule, and to place upon officers of municipal corporations a burden grievous to bear. In *Monnier v. Godbold*, *supra*, where recovery was sought against the members of a pharmacy board in failing to perform an official act, it was held that it was the neglect of the body and not the neglect of the individuals composing it, and further it was said, "In the case before us the act complained of was not one of commission, but of omission (a refusal to grant a certificate), and the action or nonaction of the corporate body was one with which the defendants were connected exclusively in their positions as members of the board. Nothing which they did or could not do, simply as individuals, could alter the situation. As individuals, they were strangers to the act complained of." In 2 Shearman & Redfield, Negligence (6th ed.) §340a, the rule is thus stated, "whether such officers are to be deemed agents of the city in its cor-

porate capacity, or public officers in law, in neither case, if the act complained of is one of nonfeasance only can it be made the basis of a private action; yet the general rule may be said to be that if such act is one of misfeasance, and directly injures a plaintiff, he is entitled to maintain his action against them individually for injury wrongfully inflicted."

The omission to perform the duty, which appellant alleges was the cause of the injury, was the neglect of the board of commissioners, and not of the individuals comprising it, and, under the authorities, no liability exists as against the individual members of the board. The demurrer was properly sustained to the complaint. Judgment affirmed.

NOTE.—Reported in 110 N. E. 237. Liability of county boards to private individuals, see 95 Am. St. 80. On liability of county for injuries to persons from condition of buildings, see 39 L. R. A. 59. See, also, under (1) 11 Cyc 497, 498; (2) 29 Cyc 424; (3) 11 Cyc 380, 411, 412.

### INDIANA BOARD OF PHARMACY v. HAAG.

[No. 8,750. Filed November 19, 1915.]

APPEAL.—*Review.*—*Ruling on Demurrer.*—*Constitutional Questions.*—*Transfer.*—Where charges instituted to revoke a druggist's license were demurred to for want of sufficient facts and also upon the ground that the statute under which the proceeding was instituted was unconstitutional and void, the error assigned on the sustaining of such demurrer necessitated the transfer of the appeal to the Supreme Court on the theory that a constitutional question was involved, although the latter ground stated is not recognized as ground for demurrer, since the trial court may have treated it as a part of the memorandum pointing out wherein the charges were insufficient for want of facts, and especially in view of the rule that the court on appeal will search the record to uphold the sustaining of the demurrer on any sufficient ground though not contained in the memorandum of defects.

From Marion Circuit Court; (20,673) Charles Remster, Judge.

Action by the Indiana Board of Pharmacy against

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Indiana Board, etc. v. Haag—60 Ind. App. 218.

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Julius A. Haag. From a judgment for defendant, the plaintiff appeals. *Transferred to Supreme Court.*

*Thomas M. Honan, Frank P. Baker and Gavin, Gavin & Davis*, for appellant.

*Ryan, Ruckelshaus & Ryan*, for appellee.

HOTTEL, J.—This is an appeal by appellant, Indiana Board of Pharmacy, from a judgment of the Marion Circuit Court in a proceeding brought before such board to revoke appellee's license as a registered pharmacist of Marion County, Indiana, because of appellee's alleged gross immorality. Upon the original charges filed a trial was had before such board and an order made by it revoking appellee's license. From this order there was an appeal to the Marion Circuit Court where amended charges were filed, and a demurrer thereto was sustained. The appellant elected to stand on its amended charges and refused to plead further whereupon judgment was rendered against appellant that it take nothing by its amended complaint and that its revocation of appellee's license be set aside and that appellee be reinstated in his right to practice pharmacy under such license the same as though never revoked.

The ruling on said demurrer to appellant's amended charges is the only error relied on for reversal. This demurrer is, in part, as follows: "Comes the defendant Julius A. Haag, and demurs to the plaintiff's complaint and amended charges filed in said cause, and for grounds of said demurrer assigns each of the reasons following: (1) Said complaint and amended charges do not contain facts sufficient to constitute a cause of action against him. (Here follow separate grounds of objection to such complaint or amended charges under the respective subheads, (a), (b), (c), (d), (e), (f), (g),

(h), and (i), which we need not set out) \* \* \*

(2) For a further ground of demurrer to the complaint and amended charges herein, defendant says that the Indiana Board of Pharmacy is without authority to revoke his certificate of registration on the charge of gross immorality for the reason that the phrase 'gross immorality' contained in the statute, giving said board the power to revoke certificates of registration, is vague and uncertain and fixes no standard even approximately for determining the moral qualifications of the person to be entrusted with a certificate of registration as a pharmacist. And further, said phrase is so indefinite, vague and uncertain that it does not give the holder of a certificate any definite information as to what he may be called upon to meet, in the event the said board desires to revoke his license upon the grounds of gross immorality, and it gives the said board of pharmacy a discretion which may be controlled by prejudice, passion, favoritism or ill will, without any specific facts being given as the basis of the judgment of such board. (3) For further ground of demurrer to complaint and amended charges herein, defendant says that section 3 of an act of the General Assembly of the State of Indiana, entitled 'An act conferring certain powers and duties on the Indiana board of pharmacy, and matters properly connected therewith,' approved March 4, 1911, in so far as said section purports to give to the Indiana Board of Pharmacy the power to grant certificates of registration, or to revoke such certificates already granted to any person, on the ground of gross immorality, alone is unconstitutional and void for the reasons following: (a) The phrase 'gross immorality' is vague and uncertain and does not furnish any fixed standard by which a person might even proximately know his rights in the premises;

under said act the holder of a certificate of registration could not know and can not know what acts or what conduct or what grade of morals might be regarded by the board of pharmacy as sufficient to constitute gross immorality; and the board of pharmacy, under said act is given a discretion which may be controlled by prejudice, passion, whim, ill will or favoritism. (b) So much of said section 3 of said act as purports to give to the Indiana Board of Pharmacy power to revoke certificates of registration on the grounds of gross immorality, violates the provision of section 23, article 1, of the Constitution of the State of Indiana, which is as follows: 'The general assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens'; and also violates §23, article 4, of the Constitution of the State of Indiana, which is as follows: 'In all the cases enumerated in the preceding section, and in all other sections where the general law can be made applicable, all laws shall be made general and of uniform operation throughout the state.' (c) So much of said §3, of said act, as purports to or attempts to grant the Indiana Board of Pharmacy power to revoke certificates of registration because of gross immorality, is unconstitutional because the same is unfair, and is uncertain and vague, and fixes no standard for the board in determining the qualifications of the holder of the certificate, nor does it furnish any standard by which the holder of the certificate may approximately know what acts or what conduct the board might construe to be an amount of gross immorality; and under said act, if constitutional the board of pharmacy is given the power of discretion to be exercised by it that may be based upon the whims or prejudices or passions of the members thereof, and by reason of

said powers, the board might fix one standard of morality for one locality and another standard for another; might regard certain acts as amounting to gross immorality in one county or city, or in one part of a county or city, which they might hold would not amount to gross immorality in other parts of the county or city in the State, and under said act privileges and immunities may be granted by said board to certain citizens which might be withheld from other citizens, although similarly situated."

It will be observed that appellee by the third ground of his demurrer and by the subheads, (a), (b) and (c) attempts to challenge the constitutionality and validity of the section of statutes on which this proceeding is based, viz., "Section 3 of the act entitled 'An act conferring certain powers and duties on the Indiana Board of Pharmacy, and matters properly connected therewith,' approved March 4, 1911," being §9735c Burns 1914, Acts 1911 p. 443. While such ground of demurrer is one not recognized or enumerated as a ground for demurrer under §344 Burns 1914, Acts 1911 p. 415, yet the trial court may have treated all that followed the first ground of the demurrer, including said third ground and the reasons therefor stated in the subheads thereunder, as a part of the statement or memorandum required by §344, *supra*, pointing out wherein the amended charges were insufficient for want of facts. In any event the appellant tribunal will search the record to affirm the judgment below and where a demurrer based on the ground that the complaint does not state facts sufficient has been sustained by the trial court the appellate tribunal will uphold such ruling on any sufficient ground though not contained in the memorandum accompanying such demurrer. *Bruns v. Cope* (1914),



182 Ind. 289, 296, 105 N. E. 471. This being true, we think the question of the validity and constitutionality of said section of said act is presented by this appeal and hence jurisdiction thereof is in the Supreme Court. Subd. 1, §1392 Burns 1914, Acts 1907 p. 237. The case is therefore transferred to the Supreme Court under §1397 Burns 1914, Acts 1901 p. 565.

NOTE.—Reported in 110 N. E. 248. See, also, 11 Cyc 816.

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### VANDALIA RAILROAD COMPANY v. BRYAN.

[No. 8,650. Filed November 23, 1915.]

1. **PHYSICIANS AND SURGEONS.—*Liability for Services.—Persons Liable.***—Ordinarily a person who summons medical aid for another is not liable for the value of such services unless he stands in some relationship creating an obligation to furnish such aid, nor is a corporation generally liable for the employment, by one of its officers, of physicians and surgeons to attend upon sick and injured employees, unless it gave special authority for such employment. p. 227.
2. **RAILROADS.—*Employment of Surgeon.—Liability for Services.***—Although on ordinary occasions a station master may not bind the railroad company for medical services, where an employe is injured so that immediate attention is demanded in order to save life, or prevent great injury, authority arises in the highest officer of the company present, by reason of the emergency, to bind the company for such medical or surgical aid as the emergency demands; hence, where a trespasser was struck by a train, and by order of the company's superintendent was sent to a station where a surgeon rendered what assistance was possible, and, in the absence of hospital facilities, the man was then removed to another station where the necessary aid could be procured, the station master at the latter place had authority, in the absence of a higher official, to bind the company for such medical aid as the emergency demanded. p. 227.
3. **RAILROADS.—*Employment of Surgeon.—Liability for Services.—Calling in Other Surgeons.***—Where there was authority for the employment of a surgeon by a railroad station master so as to bind the company, and the emergency of the case made additional surgical and medical aid absolutely necessary, the surgeon thus employed was justified in calling the necessary additional aid and could recover for their services as well as for his own. p. 228.

4. **PHYSICIANS AND SURGEONS.—*Liability for Services.—Persons Liable.***—Where, pursuant to authority arising from the emergency, a railroad station master employed a surgeon to attend a person struck by a train, and afterwards notified him that the company would not be liable for any further services or attention rendered the injured person, the surgeon could not recover from the company for any services rendered after such notice beyond what was absolutely demanded by the emergency. p. 229.
5. **RAILROADS.—*Employment of Surgeon.—Liability for Services.***—Where a surgeon was employed by a railroad station master, pursuant to authority arising from the emergency, to attend a man who had been injured by a train, the right of recovery for the services of such surgeon and of assistants called in by him was limited to emergency or first aid services, and when such services as were necessary to relieve the suffering of the injured party or preserve his life had been rendered, the emergency ceased to exist, and the company was not liable for subsequent medical services, unless by reason of some additional contractual relation. p. 231.
6. **RAILROADS.—*Employment of Surgeon.—Action for Services.—Jury Question.***—The question of what constituted first aid emergency services to a person struck by a train, in an action against the railroad company to recover therefor, was a question of fact for the jury. p. 232.

From Knox Circuit Court; *B. M. Willoughby*, Judge.

Action by Charles S. Bryan against the Vandalia Railroad Company. From a judgment for plaintiff, the defendant appeals. *Reversed*

*Pickens & Pickens* and *John G. Williams*, for appellant.

*Shuler McCormick*, for appellee.

**IBACH, C. J.**—This was an action by appellee on account, in which he recovered \$350 for medical and surgical services rendered to Carl Holsappel, at the request of appellant. The evidence shows that on the afternoon of January 2, 1912, Carl Holsappel was injured by one of appellant's trains traveling eastward in Greene County, Indiana, that by the direction of appellant's superintendent he was picked up by the conductor of a westbound train, to be taken to Worthington, that the company's

surgeon at Worthington was waiting, placed a tourniquet on one of his legs, and rendered what assistance was possible, that as there was no place at Worthington to leave him, he was brought to Vincennes, the train stopping enroute at Bicknell, where he was treated by appellant's physician there, that the train arrived at Vincennes after nine o'clock in the evening, and Frank Jamison, appellant's station master at Vincennes, had been notified that the train was bringing in an injured man, and as the appellant's surgeon at Vincennes was not in town, Jamison engaged Dr. Bryan, appellee, to render what aid was necessary, that Dr. Bryan took Holsappel to a hospital, made an examination and found his right leg badly lacerated, and hanging by shreds, and his left foot almost crushed off, and amputation was necessary, that in order to perform this amputation it was necessary for him to have assistance, and he called in Drs. Ramsey and Stewart, for whose services he is seeking to recover, as well as for his own, that Jamison knew of the employment of Drs. Ramsey and Stewart, that the doctors that evening made a thorough examination, gave Holsappel stimulants, and as they found him bleeding from the stump of the right limb, cut off the hanging parts, and controlled the hemorrhage, that they decided that amputation was necessary, and planned for such operation.

Shortly after that, Jamison called Dr. Bryan over the telephone, and told Dr. Bryan that the company had found that Holsappel was a trespasser, and it was not liable for his injury, and would not be responsible for any further medical services rendered to him. Dr. Bryan told him that Holsappel would die if not taken care of, but Jamison refused to accept further liability. Jamison then communicated

with the township trustee of the township in which Vincennes is situated and he refused to accept liability, of which fact Jamison informed appellee that same evening. The doctors continued attention through the night, giving him treatments to overcome shock, and the next morning amputated his right leg and left foot. Dr. Bryan attended him for about six weeks, making about one hundred visits, and the other doctors made in that time some twenty or thirty visits. As soon as possible he was removed to his home at Spencer. Appellant, through Jamison, took some steps towards attempting to recover compensation for Dr. Bryan from the trustee of the township where Holsappel was injured, and the trustee of the township where he lived, he being a poor person, but nothing was collected. Dr. Bryan testifies that at one time Jamison promised to pay him for first aid, but refused to pay for further services, that he never rendered appellant a bill for all his services, but presented to Jamison, as its agent, a bill for \$175 for first aid, which he refused to pay. The testimony shows that the reasonable value of all the services rendered by the three doctors was from \$1,000 to \$1,200. The doctors on cross-examination testified that after Jamison revoked his authority on the evening of January 2, other competent physicians and surgeons could have taken the case from that time and rendered the attention which they gave.

Appellant questions the correctness of several instructions given by the court to the jury. It is urged as an objection to several of these that Jamison had no authority to bind the company for medical services.

Ordinarily, one who summons medical aid for another person is not liable for the value of such services, unless he stands in some relationship creating

an obligation to furnish medical aid.

1. *Cotnam v. Wisdom* (1907), 83 Ark. 601, 104 S. W. 164, 119 Am. St. 157, 12 L. R. A. (N. S.) 1090, 13 Ann. Cas. 25, and cases cited. It is also a general rule that "officers of corporations organized for, and engaged in, commercial pursuits, without special authority, can not, as a legal right, charge the corporation with the employment of physicians and surgeons to attend upon sick and injured employes." *Cushman v. Cloverdale Coal, etc., Co.* (1908), 170 Ind. 402, 84 N. E. 759.

It is undoubtedly true that on ordinary occasions, and at times when a superior officer was in reach, a station master could not bind the railroad

2. company to pay for medical services. But when an employe is injured by a railroad train, and immediate attention is demanded in order to save life, or prevent great injury, in this pressing and imperious need it is held that when the highest officer of the corporation present engages a physician, the emergency has created in him authority to bind the company to pay for such services as the emergency demands, and no more. *Terre Haute, etc., R. Co. v. McMurray* (1885), 98 Ind. 358, 49 Am. Rep. 752; *Terre Haute, etc., R. Co. v. Brown* (1886), 107 Ind. 336, 8 N. E. 218; *Louisville, etc., R. Co. v. Smith* (1890), 121 Ind. 353, 22 N. E. 775, 6 L. R. A. 320. This rule has also been applied in cases where the injured person was a passenger, or even a trespasser, and we believe that the fact that Holsappel was a trespasser has no bearing on the authority possessed by Jamison when he engaged appellee. Under the facts of this case as known to Jamison and appellee, when Holsappel was brought to Vincennes, Jamison had in the urgent exigency then existing a limited degree of authority as before mentioned. We think that under the circum-

stances of his hiring, appellee was fully justified in undertaking to render services necessary to Holsappel, upon appellant's responsibility. It was not for appellee, in the emergency, to investigate whether appellant was liable to Holsappel before undertaking to aid him. As said in the case of *Bonnette v. St. Louis, etc., R. Co.* (1908), 87 Ark. 197, 112 S. W. 220, 128 Am. St. 30, 16 L. R. A. (N. S.) 1081, "Before sufficient time had intervened to ascertain whether the accident was caused by the negligence of the company, he (the highest agent on the ground) certainly had at least the implied authority to protect his company by doing what might be necessary to lessen the damages in the event it should be afterwards ascertained that the company was liable. This authority would be sufficient to bind the company for his contract with the surgeon." See, also, *Northern Cent. R. Co. v. State* (1868), 29 Md. 420, 96 Am. Dec. 545; *Dyche v. Vicksburg, etc., R. Co.* (1901), 79 Miss. 361, 30 South. 711; *Marquette, etc., R. Co. v. Taft* (1873), 28 Mich. 289, 297; *Tippecanoe Loan, etc., Co. v. Cleveland, etc., R. Co.* (1915), 57 Ind. App. 644, 104 N. E. 866, 106 N. E. 739; *Langan v. Great Western R. Co.* (1873), 30 L. T. (N. S.) 173.

If the condition of the patient and the emergency of the case made additional surgical and medical aid absolutely necessary, we think that the

3. doctor engaged by appellant's servant to perform the necessary services, would be justified in calling the necessary additional aid, and that in this action he could recover for their services as well as for his own. *Louisville, etc., R. Co. v. Smith, supra*; *Terre Haute, etc., R. Co. v. Brown, supra*; *Board, etc. v. Brewington* (1881), 74 Ind. 7.

The next question is as to the revocation of authority, and the amount of recovery. The court seems

to have tried the case on the theory that ap-  
4. pellee was suing to recover for services rendered under employment by appellant's agent, that the defense was that the employment was by mistake, and when the agent discovered it he countermanded the employment, and the court's view was that if the defense was made out the appellant was not liable for anything done except what was necessarily connected with the first employment, that is, whatever was done under it, and whatever was absolutely necessary to do. The court instructed the jury that if appellant by its agent employed appellee to attend Holsappel, and afterward notified appellee that appellant would not be liable for any further services or attention rendered to Holsappel, then appellant would not be liable to appellee for any services undertaken after such notice. We think there was no error in this instruction. We have held that Jamison had authority to bind appellant for emergency services. We have also held that his authority expired when he came into communication with his superior officers, and the evidence shows that when he had communicated with them, he attempted to revoke the authority given. The question then is, how far could appellee go under the contract previously made with Jamison? The cases already cited limit the duty of the railroad company to the emergency, and its liability to the services demanded by the emergency. It was said in *Ohio, etc., R. Co. v. Early* (1895), 141 Ind. 73, 81, 40 N. E. 257, "The duty arises with the emergency, and with it expires." In *Toledo, etc., R. Co. v. Mylott* (1893), 6 Ind. App. 438, 448, 33 N. E. 135, "the liability of the company ended with the termination of the emergency." In *Evansville, etc., R. Co. v. Freeland* (1892), 4 Ind. App. 207, 212, 30 N. E. 803, it was held that after the amputa-



tion of the injured man's leg the emergency had expired, and the railroad company could not be bound by the direction of its superintendent of construction to the physician to continue treating him. In *Holmes v. McAllister* (1900), 123 Mich. 493, 82 N. W. 220, 48 L. R. A. 396, it was said that the company was liable only "for immediate services made necessary by a present urgency". In *Louisville, etc., R. Co. v. Smith, supra*, it is said that the agent "had the authority to do what the emergency demanded, in order to preserve his injured fellow employe from serious harm, but he had no authority to do more." In *Hays v. Wabash R. Co.* (1906), 119 Mo. App. 439, 95 S. W. 299, where the rules of the company required the train employes in cases where passengers were injured, to call the nearest competent surgeon, and then notify the company, and the local surgeon of the company, called in by a conductor to attend an injured passenger, did not notify the company, it was held that he could recover only for services rendered for such reasonable time as the company could have been notified and its answer received. In *Terre Haute, etc., R. Co. v. Stockwell* (1889), 118 Ind. 98, 20 N. E. 550, where the company was held liable for medical services rendered to a stranger struck by a locomotive, the physician having been employed by the conductor, recovery was allowed on the theory that the general officers of the company, on being informed by the conductor did not repudiate the employment. In many other cases a recovery has been upheld on the ground of ratification by superior officers. In *Holmes v. McAllister, supra*, it was said, "Such employment does not make the employer liable for the services rendered by the physician to the employe after the emergency has passed. If the physician desires to hold the employer responsible for subse-

quent services, he must make a special contract with him." In *Salter v. Nebraska Tel. Co.* (1907), 79 Neb. 373, 112 N. W. 600, 13 L. R. A. (N. S.) 545, it was said, "We believe, however, that emergency services, unless expressly limited at the time of procuring them, ought to extend to a sufficient time for the party employed to communicate with the company, and, if it declines to be further responsible, for notice to the proper proper authorities, if the injured party is entitled to public care."

Appellant urges that even if it is held that Jamison had authority to hire appellee in the first place, the amount of recovery is too great, for the services rendered before the revocation of authority were, it is contended, not of the value of \$350. Appellee urges that all the services were necessarily incident to the first employment, and in this sense were undertaken before the revocation. The effect of the holdings in the cases quoted above would seem to indicate that the emergency must be held to have ceased before all the services rendered by the doctors were given.

We have referred to these cases out of the number in which kindred questions have been considered, for the purpose of showing how far some authorities have gone, which seem to be in accord with the direct holdings and intimations in our own State. In some jurisdictions the rule as announced has been extended, in others it has been limited. It seems to us, however, that all of the better reasoned cases have limited the recovery of physicians employed as was appellee in this case to what should be termed as emergency or first aid services, and no more. And in all such cases an emergency exists where the exigencies are of so pressing a nature that immediate action must be taken to relieve the injured party from his present suffering, or preserve his life, and

when such services have been rendered, the emergency authorizing the original employment ceases to exist, and there is no further liability for medical services unless such further liability arises by reason of some additional contractual relation between the parties. It is the inability of the injured party to obtain medical aid for himself that gives rise to the emergency.

We have examined the record in this case carefully, and we are unable to find any evidence from which the jury could fix the value of the services rendered by appellee falling within the foregoing rule and the law generally covering this case.

We have held that under the facts of this case appellant is liable to appellee for emergency first aid services rendered, and what shall constitute first aid emergency services is a question of fact for the jury, and as there was no evidence introduced from which the value of such services, independent of the value of all services rendered by appellee and the other physicians, can be ascertained, we are required to reverse the judgment. Judgment reversed.

NOTE.—Reported in 110 N. E. 218. As to liability of master for services of physician whom he summons to care for employe, see 18 L. R. A. (N. S.) 174. As to the implied authority of officers, agents or servants to contract for medical, surgical or other attendance or supplies for sick or injured persons, see 3 Ann. Cas. 570; Ann. Cas. 1912 C 474. See, also, under (1) 10 Cyc 926; 30 Cyc 1597; (2) 2 C. J. 662; 10 Cyc 926; 31 Cyc 1399; (3) 30 Cyc 1597; (4) 30 Cyc 1597, 1598; (5) 30 Cyc 1597; 31 Cyc 1401.

## NATIONAL LIVE STOCK INSURANCE COMPANY v. BARTLOW.

[No. 8,658. Filed November 23, 1915.]

1. **INSURANCE.—Live Stock Insurance.—Construction of Contract.—Notice of Sickness.**—The provision of a policy of live stock insurance that the company would not be liable for loss occurring by the death of the animal from sickness if the assured failed to render at once notice to the secretary of the company of such sickness, should be reasonably construed so as not to require notice of a mere temporary and inconsequential indisposition bearing no relation to the prospective health or continued existence of the animal, and as not to require notice simultaneous with the manifestation of the physical disorder, and regardless of attending circumstances. p. 237.
2. **INSURANCE.—Live Stock Insurance.—“Sickness”.—“Illness”.**—The terms “sickness” and “illness” are practically synonymous and may include a physical disorder of a less serious character than a disease, but as used in insurance contracts they denote a disease or ailment of such character as to affect the general soundness and health of the system of the subject involved, and not a mere temporary indisposition which does not tend to undermine and weaken the constitution. p. 237.
3. **INSURANCE.—Live Stock Insurance.—Notice of Sickness.—Duty of Assured.—“At Once”.**—While a stricter rule of construction is to be enforced against assured under a policy of live stock insurance calling for notice to the company at once of the sickness of the animal, than is applied in cases requiring information of a past illness, such a policy does not necessitate instantaneous action on the part of the assured, but requires that he act from the viewpoint of the reasonably possible termination of the illness involved, the requirement for notice “at once” meaning that notice shall be given within such time as is reasonable in view of the circumstances. p. 238.
4. **INSURANCE.—Live Stock Insurance.—Notice of Sickness.—Liability.**—A policy of live stock insurance providing that the company should not be liable in case of the death of the animal from sickness if the assured failed to render at once notice to the secretary of the company of such sickness, though perhaps not requiring it in all cases, plainly contemplated that notice be given before the decease of the animal, and the assured could not recover in an action thereon where the animal insured became sick in the evening of one day and died in the morning of the second day following, and the assured, though having opportunity to do so, failed to notify the company of such sickness. p. 238.

From Pike Circuit Court; *John L. Bretz*, Judge.

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National Live Stock Ins. Co. v. Bartlow—60 Ind. App. 233.

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Action by Claude Bartlow against the National Live Stock Insurance Company. From a judgment for plaintiff, the defendant appeals. *Reversed.*

*Mitchel S. Meyberg*, for appellant.

*Edward P. Richardson* and *Arthur H. Taylor*, for appellee.

CALDWELL, J.—Appellant, an Indiana corporation, in consideration of a premium of \$10, paid in advance, and the warranties, conditions and agreements contained in the application and policy, issued to appellee a policy of insurance, by which appellee was insured against loss to the amount of \$200 that he might otherwise incur through the death or theft of two horses, designated as “Tom” and “Bill”. Half the insurance was placed on each of the animals. The term of insurance was twelve months expiring September 15, 1912, at noon. Tom having died September 13, 1912, appellee brought this action on the policy to recover for the loss.

The policy contained the following provision:

“This company will not be liable for losses occurring through neglect or carelessness of the assured \* \* \* nor if the assured, in case of sickness or accident to the animal or animals hereby insured shall fail to render at once notice to the secretary of the company of such sickness or accident, together with the name and address of the veterinary employed. \* \* \*

And it is hereby understood and agreed by and between this company and the assured that this policy is made and accepted in reference to the foregoing terms and conditions, which are hereby declared to be a part of this contract, and are to be used and resorted to in order to determine the rights and obligations of the parties hereto.”

Appellant in addition to a general denial answered specially, to the effect that the horse Tom, in May, 1912, became sick with kidney trouble; that it thereafter seemed to recover, but that there was a return of such disorder September 12, 1912, and continuing sick, it died from such disease September 13, 1912; that neither appellant nor its secretary had any knowledge of such sickness until long after the death of the animal; that appellee could have given notice of such sickness as required by the policy, but that he did not do so.

A trial by the court resulted in a judgment for appellee in the sum of \$102.40. On this appeal appellant presents the single question of the sufficiency of the evidence. The weight of the evidence would seem to indicate that the May sickness was kidney trouble, but there was other evidence to uphold a finding that it was trivial in its nature and harmless in character. In any event that sickness was apparently of but two or three hours duration, and from it the horse seemed to recover rapidly and fully. On the evening of September 11, 1912, appellee discovered that the horse was again sick. This sickness continued, resulting in the death of the animal on the forenoon of the thirteenth. A veterinary was called the morning of the twelfth. The malady was kidney trouble. One-fourth mile from appellee's residence was a telephone, and also a postoffice box from which letters could be mailed. At Petersburg, four miles distant, was a telegraph office. In no manner prior to the death of the animal did appellee notify or attempt to notify appellant or its secretary of the sickness. No excuse is given for such failure. Appellant's agent who solicited the insurance, and who delivered the policy after appellant had issued it, lived and maintained an office at Petersburg. On the evening of the thirteenth, ap-

pellee went to Petersburg, for the purpose of informing appellant's agent that the horse had died. The agent being out of town appellee returned to his home without seeing him. On the fifteenth, which was Sunday, he returned to Petersburg, saw the agent, informed him that one of the insured animals was dead, and requested him to notify the company. The agent informed appellee that it was his duty to give notice of loss, and presented him a sheet of paper and an envelope to be used for that purpose. On September 16, appellee, at Vincennes, mailed such notice to appellant. On receipt of the notice, appellant forwarded to its agent at Petersburg blanks to be used in making proof of loss, and under date of October 8, proof was made out, signed by appellee, and forwarded to appellant. The proof of loss disclosed the facts substantially as herein set out respecting the sickness and death of the horse, and also that it had had some sickness from kidney trouble in May, whereupon by letter appellant denied liability.

As we have indicated, the policy contained express provision to the effect that the company would not be liable for loss occurring by the death of an insured animal if such animal became sick and the assured failed to render at once notice to the secretary of the company of such sickness. Dismissing from consideration a case of sickness from which there is a recovery, as the May sickness here, and directing our attention to sickness terminating fatally, as the September sickness here, the provisions of the policy are plain and unambiguous that notice of sickness is a condition precedent to the attaching of liability for a loss resulting from the death of the insured animal caused by such sickness. It can not be contended that appellant waived the required notice, or that it is estopped



from availing itself of the want of notice, for the reason that, under the evidence, appellant, after receiving knowledge of the circumstances preceding and attending the death of the animal promptly denied liability, and neither required nor received anything further from appellee.

The language of the policy literally interpreted would require notice in case of sickness, however trivial, and that such notice be given by in-

1. **stantaneous action.** The language, however, should receive a reasonable interpretation. It should not be construed to require such notice in the case of mere temporary indisposition, plainly and apparently inconsequential in nature, and bearing no relation to the prospective health or continued existence of the animal. Nor should it be so interpreted as to require notice simultaneous with the manifestation of the physical disorder, and regardless of attending circumstances.

Thus, it is held that a physical ailment may

2. **be of such a trivial nature as not to amount to a sickness or disease as those terms are used in an application for an insurance policy.** *Manhattan Life Ins. Co. v. Francisco* (1873), 17 Wall. 672, 21 L. Ed. 698. It is held also that the term "illness" which is practically synonymous with the term "sickness" may include a physical disorder of a less serious character than a disease. *Connecticut Mut. Life Ins. Co. v. Union Trust Co.* (1884), 112 U. S. 250, 5 Sup. Ct. 119, 28 L. Ed. 708. The former term has been defined by this court as a disease or ailment of such a character as to affect the general soundness and health of the system of the subject involved, and not a mere temporary indisposition which does not tend to undermine and weaken the constitution. *Prudential Life Ins. Co. v. Sellers* (1913), 54 Ind. App. 326, 102 N. E. 894. See, also,

*Billings v. Metropolitan Life Ins. Co.* (1898), 70 Vt. 477, 41 Atl. 516; *Modern Woodmen, etc. v. Miles* (1912), 178 Ind. 105, 97 N. E. 1009.

In each case cited the terms "illness" and "sickness" were under consideration as used in applications for insurance policies, and after the de-

3. cease of the insured. The assured there in making his application, in each case was viewing a past physical indisposition retrospectively and after its severity and results were fully known. Here the assured, respecting any particular sickness of the animal and his duty to give notice, was required to act from the standpoint of the prospective and before he could know the course or termination of the sickness, and it would therefore seem that a stricter rule of construction should be indulged against him than in the cases cited. He should be required to act from the viewpoint of the reasonably possible termination of the illness involved. In contracts of various kinds, the phrase "at once" is construed as synonymous with "immediately", "forthwith", etc., where the subject-matter is the giving of notice. It is held that the use of such a term does not ordinarily call for instantaneous action, but rather that notice shall be given within such time as is reasonable in view of the circumstances. *Cohen v. Silverman* (1896), 4 App. Div. 503, 40 N. Y. Supp. 8; *Bennett v. Lyconing, etc., Ins. Co.* (1876), 67 N. Y. 274; *Warder, etc., Co. v. Horne* (1900), 110 Iowa 285, 84 N. W. 591; 1 C. J. 474.

In determining the question of reasonable time here, we can not lose sight of the fact that the policy, while it may not require it in all cases, plainly

4. contemplates that notice of sickness should be given before the decease of the animal. In some cases, however, death might follow so rapidly

on the footsteps of the sickness as that prior notice of the sickness would not be reasonably possible. With these preliminary observations, we proceed to determine whether notice of the sickness here was necessary as a condition to liability. In *Alston v. Northwestern Live Stock Ins. Co.* (1898), 7 Kan. App. 179, 53 Pac. 784, the policy provided that in case of sickness of the animal insured, notice by telegram should be given at once, otherwise that the policy should be void. The animal after being sick for six days died. No notice of the sickness was given. The court in holding that there was no liability, said: "There is no question but that, under the terms of this clause of the policy, it is the duty of the plaintiff in any event to notify the company of the sickness of the animal. It is expressly provided that in case of a failure to do so the policy should become void absolutely. There is no room for construction or interpretation. The provision is clear and emphatic." In *Swain v. Security Live Stock Ins. Co.* (1896), 165 Mass. 321, 43 N. E. 105, the policy provided that in case the insured animal became sick, the owner should notify the company within fifteen hours. The animal became sick and lived twenty hours, after it was known to be sick, but notice was not given until after its death. Held that there could be no recovery. In *Green Bros. v. Northwestern Live Stock Ins. Co.* (1893), 87 Iowa 358, 54 N. W. 349, the insured horse was taken sick with pinkeye. For several days it plainly manifested the symptoms of the disease, and then died. Notice required by the policy was not given. Held there was no liability. The following quotation indicates the facts and likewise the decision in *Johnston v. Northwestern Live Stock Ins. Co.* (1900), 107 Wis. 337, 83 N. W. 641: "The policy provides that, in case of sickness of the horse, the insured

‘shall *at once* notify the company by telegram of the fact of such sickness; \* \* \* otherwise, this policy shall be void’. \* \* \* The fact was without dispute that the horse was found to be sick in the morning of Sunday, November 5, 1893, and died in the afternoon of the same day, and that no telegram notifying the company of the fact was ever sent. \* \* \* The agreement was absolute to telegraph to the company at once; not to use ordinary care or reasonable diligence to do so. \* \* \* This was an agreement in the nature of a promissory warranty, and if not strictly fulfilled there could be no recovery. Certainly, nothing short of impossibility of fulfillment could excuse a breach, nor does it avail to say that its fulfillment would have done no good in this case. The parties chose to make it an absolute essential to the validity of the contract upon which the right of recovery depends. In effect, it is a promissory warranty, and the question as to its materiality or usefulness is not open.” See, also, note to *Joplin v. National Live Stock Ins. Co.* (1912), 44 L. R. A. (N. S.) 569, where the case above cited and others are digested.

In our judgment, however, the phrase “at once” as used in the policy should be construed as hereinbefore indicated, rather than as in the Johnston case, *supra*; that is, that such phrase calls for reasonable promptness of action, rather than instantaneous action. In determining what action is reasonable, regard should be had to the provisions of the policy, the symptoms manifested by the sick animal, and the surrounding circumstances. See *Pacific Mut. Life Ins. Co. v. Branham* (1904), 34 Ind. App. 243, 70 N. E. 174. The facts here are before the court and are undisputed. No notice of the sickness was given or attempted to be given. The failure to do so is unexplained. Under the

facts here presented, we hold that the loss occasioned by the death of the horse is not brought within those insured against by the provisions of the policy. The judgment is reversed with instructions to sustain the motion for a new trial.

NOTE.—Reported in 110 N. E. 224. As to deterioration in value of animals, see 36 Am. St. 831. For a general discussion of animal insurance, see Ann. Cas. 1915 A 614. See, also, under (1, 4) 25 Cyc 1519; (3) 25 Cyc 1916 Anno. 1519.

### GATES v. WEYENBERG ET AL.

[No. 8,770. Filed November 23, 1915.]

1. APPEAL.—*Perfection of Appeal.—Filing Transcript.*—An attempted term time appeal is not perfected as such where the transcript is not filed in the court on appeal within the time allowed by §679 Burns 1914, §638 R. S. 1881. p. 243.
2. APPEAL.—*Imperfect Term Time Appeal.—Vacation Appeal.—Parties.*—An attempted term time appeal, not perfected as such, could not be treated as a vacation appeal where there was no judgment below in favor of one of the parties named as an appellee. p. 244.

From Superior Court of Marion County (88,120);  
*Joseph Collier*, Judge.

Action by Seth E. Gates against Peter C. Weyenberg and another. From the judgment rendered, the plaintiff appeals. *Appeal dismissed.*

*Fitzpatrick & Fitzpatrick*, for appellant.

*Taylor & Huls* and *B. F. Watson*, for appellee.

HOTTEL, J.—Appellant brought this action against appellees to recover on three promissory notes executed by appellee Weyenberg and made payable to appellee Elliott, who had assigned said notes to appellant. The pleadings on which the case proceeded to trial consisted of an amended complaint in three paragraphs based respectively on the notes sued on, an answer in general denial, a cross-com-

plaint filed by appellee Weyenberg alleging fraud on the part of his coappellee and knowledge of such fraud on the part of appellant, an answer in denial to such cross-complaint by both Elliott and appellant, an affirmative answer of estoppel to such cross-complaint by appellant, and appellee Weyenberg's reply in denial to the affirmative answer to his cross-complaint. On the issues thus tendered there was a trial by the court and a general finding in substance as follows: That the notes in question were procured by fraud practiced upon the defendant Weyenberg by defendant Elliott and that the plaintiff should hold the notes subject to said defense, and that plaintiff should not recover thereon against Weyenberg; that plaintiff is entitled to recover on the notes and endorsement thereof as against Elliott; that the allegations of the counterclaim of defendant Weyenberg are true, and that he is entitled to have said notes as against him cancelled, but that he is not entitled to judgment for damages as against Elliott. In conformity with such finding the court rendered judgment in favor of appellant against appellee Elliott and ordered and decreed that appellant take nothing by this action against appellee Weyenberg and that said notes as against Weyenberg, "be and the same are hereby cancelled and declared void, and that defendant Weyenberg recover his costs", etc., from "plaintiff and defendant Elliott".

This finding and judgment was rendered May 5, 1913. On May 27, 1913, appellant filed a motion for new trial. On July 5, 1913, and while the motion for new trial was still pending and not ruled on the court of its own motion directed the appellee Weyenberg to file an answer to appellant's amended complaint (we quote) "so as to reform the issues to conform to the proof adduced at the trial". Pursu-

ant to this order appellee Weyenberg filed an answer containing substantially the same averments set up in his cross-complaint. Appellant objected to the action of the court in ordering the filing of such answer and objected to the filing thereof and saved exceptions to each ruling of the court in respect thereto. Appellant then filed a demurrer to said answer which was overruled. He then filed a reply in four paragraphs, the first of which is a general denial. The trial court then refused appellant's request that it hear further evidence and overruled the motion for new trial. The said several rulings of the trial court are assigned as error in this court and are relied on for reversal.

It is contended by appellee Weyenberg that appellant's brief fails to set out enough of the record to present any of said rulings. We think such briefs are sufficient, under the rules of the court to present what appellant evidently regards as the controlling question in the case, viz., the ruling of the court in directing and permitting appellee, Weyenberg, to file said second paragraph of answer after appellant had filed his motion for new trial.

We are of the opinion if we were required to determine this question that the later decisions of the Supreme Court and this court construing

1. §§403, 405 Burns 1914, §§394, 396 R. S. 1881, relative to amendments would require us to determine it against appellant's contention. *Raymond v. Wathen* (1895), 142 Ind. 367, 372, 373, 41 N. E. 815; *Laramore v. Blumenthal* (1915), 58 Ind. App. 597, 108 N. E. 602, and cases cited; *Louisville, etc., Traction Co. v. Lottich* (1915), 59 Ind. App. 426, 106 N. E. 903.

However, as the record comes to us we are prevented from considering the appeal on its merits. The motion for new trial was overruled July 5, 1913,



at which time appellant was given 120 days in which to file his bill of exceptions and 60 days in which to file his appeal bond. The appeal bond with the surety before named and approved by the court was filed in time, viz., on August 9, 1913. The transcript of the record, however, was not filed in this court until October 15, 1913, more than 60 days after the filing of such bond and hence beyond the time allowed by §679 Burns 1914, §638 R. S. 1881, for perfecting a term time appeal. *Schultze v. Maley* (1914), 56 Ind. App. 586, 590, 105 N. E. 942, and cases cited. *Town of Windfall City v. State, ex rel.* (1910), 174 Ind. 311, 312, 92 N. E. 57; *Cincinnati, etc., R. Co. v. Acrea* (1907), 40 Ind. App. 150, 156, 81 N. E. 213.

We must, therefore, determine whether the appeal is sufficient as a vacation appeal under §674

Burns 1914, Acts 1899 p. 5. It will be ob-

2. served that Francis M. Elliott is made an appellee. It will also be observed that there is no judgment below in his favor. On the contrary there is a judgment against him both on the complaint and cross-complaint. He is not, therefore, a proper appellee, but should have been made an appellant, and for this reason the appeal must be dismissed. *Continental Ins. Co. v. Gue* (1912), 51 Ind. App. 232, 98 N. E. 145, and cases there cited; *Mascari v. Hert* (1913), 52 Ind. App. 345, 347, 100 N. E. 781, and cases cited; *Souers v. Walter* (1912), 178 Ind. 599, 603, 99 N. E. 1002, and cases cited. The appeal is, therefore, dismissed.

NOTE.—Reported in 110 N. E. 227. See, also, under (1) 3 C. J. 1064; 2 Cyc 805; 3 Cyc 117.

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Schultz v. Alter—60 Ind. App. 245.

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## SCHULTZ ET AL. v. ALTER.

[No. 8,807. Filed November 24, 1915.]

APPEAL.—*Judgments Appealable.*—*Amount.*—Under §§1389, 1391 Burns 1914, Acts 1903 p. 280, Acts 1901 p. 565, prohibiting appeals to the Supreme or Appellate Court where the amount in controversy does not exceed fifty dollars, except where the validity of a franchise, ordinance or statute is questioned, or some constitutional right is involved, appellate jurisdiction is determined by the amount claimed by plaintiff if defendant prevailed below, and, at least in the absence of a set-off or counterclaim, by the amount of the judgment if the plaintiff prevailed; hence, where plaintiff asked for \$150 damages and recovered a judgment for \$25, the court could not entertain defendant's appeal therefrom, in the absence of any questions to bring it within the statutory exceptions.

From Jasper Circuit Court; *Charles W. Hanley*, Judge.

Action by Leslie B. Alter against Paul L. Schultz and others. From a judgment for plaintiff, the defendant appeals. *Appeal dismissed.*

*John A. Dunlap*, for appellant.

*George A. Williams*, for appellee.

IBACH, C. J.—Appellee brought this action against appellants in the Jasper Circuit Court, asking \$150 damages for the death of a brood mare, alleged to have been caused by appellants' negligence, and recovered a judgment for \$25, from which appellants are appealing. Under §§1389, 1391 Burns 1914, Acts 1903 p. 280, Acts 1901 p. 565, no appeal can be taken to the Supreme Court or Appellate Court in a civil case, where the amount in controversy, exclusive of interest and costs, does not exceed \$50, unless there is duly presented the question of the validity of a franchise or the validity of a municipal ordinance, or the constitutionality of a statute, or the construction of a statute, or constitutional rights. *Yahey v. Leich* (1906), 37 Ind. App. 393, 76 N. E. 926; *Sears v. Carpenter* (1905), 164 Ind. 584, 74

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N. E. 244; *Pittsburgh, etc., R. Co. v. Sneath Glass Co.* (1915), 183 Ind. 138, 107 N. E. 72. There is nothing in this case to bring it within the exceptions.

“Ordinarily the amount claimed by plaintiff determines the appellate jurisdiction where defendant prevails in the court below. \* \* \* But, however this may be, when defendant appeals, it is held in most jurisdictions, (including Indiana) that, at least in the absence of a set-off or counterclaim, the judgment, or the amount by the payment of which he may discharge himself, and not the amount of plaintiff’s claim determines the appellate jurisdiction.” 3 C. J. 403, 404. *Painter v. Guirl* (1880) 71 Ind. 240; *Cincinnati, etc., R. Co. v. McDade* (1887), 111 Ind. 23, 12 N. E. 135; *Baker v. Groves* (1891), 126 Ind. 593, 26 N. E. 1076.

The question of jurisdiction is not raised in the briefs, but this court must take notice of its lack of jurisdiction. *Yahey v. Leich, supra*. Since the amount in controversy is but \$25, we have no jurisdiction and the appeal is dismissed.

NOTE.—Reported in 110 N. E. 230. See, also, 2 Cyc 559.

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KANSAS CITY OIL AND DEVELOPMENT COMPANY v.  
IRICK, ET AL.

[No. 8,768. Filed December 7, 1915.]

**MINES AND MINERALS.—Oil and Gas Leases.—Enforcement.**—An oil and gas lease providing that lessors were to have one-eighth of all the oil produced, and \$100 a year for each gas well, that one well should be drilled every sixty days after completion of the first well until six wells were completed, and that if no well were completed within sixty days from date of the lease the grant should be null and void, unless the lessee paid at the rate of fifteen dollars per month for such delay, and that, if the lessee should fail to drill any location as per agreement, the rental clause should hold good as per first location, was, by reason of the rental clause, incapable of enforcement against the lessee in an action to recover for failure

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to drill wells subsequent to the fourth one drilled, since the only penalty provided for such a failure was a forfeiture of lessee's rights.

From Superior Court of Allen County; *Carl Yaple*, Judge.

Action by William D. Irick and another against the Kansas City Oil and Development Company. From a judgment for plaintiffs, the defendant appeals. *Reversed.*

*A. W. Hamilton, C. W. Watkins, Abram Simmons and Frank C. Dailey*, for appellant.

*Fred H. Bowers and Milo N. Feightner*, for appellees.

SHEA, J.—This action was brought by appellees against appellant in the Huntington Circuit Court, to recover judgment for money alleged to be due on a contract known as an oil and gas lease. On a change of venue it was tried in the Allen Superior Court. The complaint alleges substantially that appellees were the owners as tenants in common of certain described real estate in Huntington County, Indiana; that on October 16, 1905, they leased said lands to H. E. Wilcox, superintendent of the Penn Oil Company, of Indianapolis, Indiana, for the purpose of developing same for oil and gas by putting down and operating wells; that appellees were to "have one-eighth (1-8) of all the oil produced from said premises and one hundred (\$100.00) dollars a year for each gas well"; that lessees made an assignment of the lease and other assignments have been made as provided by law, and that appellant is now the sole owner of the lease; that pursuant to the terms of the lease four wells were put down, the last in the month of October, 1907; that appellant came into possession of the lease in November, 1907, and has been in the sole and ex-

clusive possession of the above leased premises and operating the four wells from that date to the present time; that the lease among other things provides "that one well should be drilled every sixty (60) days after completion of first well and second, etc., until six (6) wells were completed on said lease. 'In case no well is completed within sixty (60) days from date of lease, then grant shall become null and void unless second party pays at the rate of fifteen (\$15.00) dollars for each month such completion is delayed, and if second party should fail to drill any location per agreement in this lease, then this rental clause shall hold good the same as per first location.' " That since appellant has become the owner of the lease and taken possession of the premises, no other additional wells have been put down and appellant has not paid appellees any rental whatever for delay in putting down the wells as provided by the lease; that appellees have fully complied with all the conditions of the lease on their part, and there is now due them the sum of \$1,200 as rental for delay in putting down additional wells as provided for in the lease, for which amount judgment is prayed.

The material parts of the oil and gas lease made a part of the complaint by exhibit are as follows:

"In consideration of the sum of one dollar, the receipt of which is hereby acknowledged, A. E. Slater, and W. D. Irick of Buckeye P. O., Huntington County, Indiana, of the first part, hereby grant and guarantee unto H. E. Wilcox, Supt. of the Penn Oil Co., of Indianapolis, Indiana, second party, all the oil and gas in and under the following described premises, together with the right to enter thereon at all times for the purpose of drilling and operating for oil and gas, and to erect and maintain all buildings and structures and lay all pipes neces-

sary for the production and transportation of oil and gas. The first party shall have one-eighth (1-8) part of oil produced and saved from said premises, to be delivered in the pipe line, which second party may connect all wells, namely: all that certain lot of land situated in the township of Salamonie, County of Huntington, in the State of Indiana, described as follows \* \* \* containing forty (40) acres more or less. To have and to hold the above described premises on the following conditions: If gas is found in sufficient quantities to transport, second party agrees to pay first party one hundred (\$100.00) dollars annually for the product of each and every well so drilled, and the first party to have gas free of cost for heating and lighting purposes in dwelling house. Second party shall bury all oil and gas lines when same interfere with cultivation, and pay all damage done to growing crops by reason of operating under this grant and if second party should fail to drill any location per agreement in this lease, then this rental clause shall hold good the same as per first location. In case no well is completed within sixty (60) days from this date, then this grant shall become null and void unless second party shall thereafter pay at the rate of fifteen (\$15.00) dollars for each month such completion is delayed. A deposit to the credit of the first party in Exchange Bank, Warren, Indiana, will be good and sufficient payment for any money falling due on this grant. First party has the right to locate roads to and from places of operations, and all gates to be kept closed by second party after passing. One well shall be drilled every sixty (60) days after completion of first well, and second, etc., until there are six wells completed on said lease, and if second party should fail to drill any location per agreement in this lease, then this rental clause shall hold good the same as per first location. \* \* \*

The second party shall have the right to use

sufficient gas and water to run all machinery for operating said wells, also the right to remove all its property at any time, and may cancel and annul this contract at any time. It is understood between the parties to this agreement that all conditions between the parties hereunto shall extend to their heirs, executors, successors and assigns."

A demurrer to the complaint was overruled. Appellant answered in two paragraphs, the first a general denial, the second an affirmative paragraph of answer. A reply in general denial to the second paragraph of answer formed the issues submitted to the court for trial. Upon proper request a special finding of facts was made, and the court stated its conclusion thereon in favor of appellees; that they were entitled to recover the sum of \$840 and interest from April 21, 1910, and judgment was rendered accordingly.

Appellant assigns that the court erred, (1) in overruling its demurrer to the complaint, (2) in the conclusion of law stated on the special finding of facts, (3) in overruling its motion for a new trial. In its brief appellant states: "The complaint is based upon contract, and the contract is made a part of the complaint. \* \* \* The evidence consists wholly of admissions and the contract, which contract was introduced, admitted and read in evidence on the trial of the cause. The special finding of facts incorporates therein a full, true and complete copy of the contract sued on. The sufficiency of the complaint to withstand the demurrer which was applied thereto; the sufficiency of the evidence to support the judgment, and the sufficiency of the facts found by the special finding of facts, to support the conclusion of law, each and all depend upon the construction of the contract. If the ap-



pellant places the correct construction upon the contract, then the complaint must be held insufficient, the evidence must fail to support the judgment, and the facts found must fail to support the conclusion of law."

In view of the decided cases an elaborate discussion of the question presented need not be indulged in. In the case of *Brooks v. Kunkle* (1900), 24 Ind. App. 624, 57 N. E. 260, a contract containing a rental clause substantially identical in all essential particulars was held to be nonenforcible, as it contained no covenant to pay absolutely, the only penalty imposed upon appellee for failure to perform being a forfeiture of his rights under the contract. This case was followed in the case of *Butcher v. Greene* (1912), 50 Ind. App. 692, 98 N. E. 876, in which a contract of substantially the same terms was construed. The court in the latter case quotes with approval the following language from the case of *Brooks v. Kunkle, supra*: "There was no absolute requirement that the party of the second part should pay any rent, but the grant was to be void unless rent were paid. The instrument is susceptible of being construed as an expression of a rational and lawful agreement. We must construe it as expressed, attributing to the language its ordinary meaning; and we can not construct a different contract by injecting additional words not implied in the terms employed by the parties, or by substituting meanings merely conjectured by us to be more reasonable than those expressed." There was no absolute requirement to pay in the present contract, hence the above principle must be applied. See, also, *United States v. Comet Oil, etc., Co.* (1911), 187 Fed. 674; *Glasgow v. Chartiers Oil Co.* (1892), 152 Pa. St. 48, 25 Atl. 232; *Ohio Oil Co. v. Detamore* (1905),

165 Ind. 243, 73 N. E. 906. An affirmance of the judgment in this case, therefore, would require us to overrule the cases of *Brooks v. Kunkle, supra*, and *Butcher v. Greene, supra*, which we are not inclined to do.

In view of the conclusion reached other questions presented and argued need not be considered. The judgment is reversed with instructions to the court to sustain the demurrer to the complaint. Judgment reversed.

NOTE.—Reported in 110 N. E. 566. As to rights and estates acquired by completed location of mines, see 139 Am. St. 167. See, also, 27 Cyc 730, 734.

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### PUBLIC UTILITIES COMPANY v. COSBY.

[No. 8,816. Filed December 7, 1915.]

1. CARRIERS.—*Injuries to Passengers.—Complaint.—Knowledge of Passenger's Position.*—A complaint by a passenger for injuries by being thrown from the platform of a street car, alleging that plaintiff, when near his point of destination, informed the conductor that he desired to alight, that the conductor signalled the motor-man to stop the car, that the speed was thereupon reduced, that plaintiff, believing that the car would stop at his point of destination, stepped upon the platform preparatory to alighting, and that defendant's servants had full knowledge of his position, but negligently failed to stop the car and negligently increased its speed and caused the car to be jerked suddenly, whereby plaintiff was thrown, etc., sufficiently charged defendant's servants with knowledge of plaintiff's position upon the platform. p. 254.
2. CARRIERS.—*Carriage of Passengers.—Duty of Carrier.—Liability.*—A carrier, while not an insurer of the safety of its passengers, must exercise the highest degree of care practicable for their safety, and is responsible for injuries through its negligence, growing out of the condition of its road, character of its equipment, and the conduct of its servants; the passenger himself being without fault. p. 255.

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3. **CARRIERS.—Injuries to Passengers.—Contributory Negligence.**—It is not negligence *per se* for a passenger to go upon the platform of a moving car preparatory to alighting therefrom; hence the court can not say that plaintiff was guilty of contributory negligence on the allegations of a complaint showing that after making known to the conductor of the street car he was on that he desired to alight, that on nearing the point of his destination the speed of the car was reduced, whereupon plaintiff took his position on the rear platform preparatory to alighting, and that while in such position defendant's servants negligently failed to stop the car and negligently increased its speed and caused the car to be jerked suddenly, whereby plaintiff was thrown and injured. p. 256.
4. **CARRIERS.—Injuries to Passengers.—Complaint.—Negligence.**—A complaint by a passenger against a street car company for injuries by being thrown from the platform of the car, alleging that plaintiff notified the conductor of his desire to alight, that the signal to the motorman was given and the speed of the car slackened, whereupon plaintiff went to the rear platform preparatory to alighting, and that defendant's servants, with full knowledge of plaintiff's position, negligently failed to stop the car and negligently increased its speed and caused it to give a sudden jerk, whereby plaintiff was thrown and injured, sufficiently charged negligence on the part of defendant. p. 257.
5. **APPEAL.—Questions Presented.—Evidence.—Weight and Sufficiency.**—Alleged error based on the insufficiency of the evidence presents the question of whether there is any evidence to support the verdict in every essential, and, though the evidence may be unsatisfactory, it presents no question of law calling for a reversal. p. 258.
6. **APPEAL.—Review.—Verdict.—Evidence.**—The verdict for plaintiff was conclusive on evidence which followed the allegations of the complaint, notwithstanding such evidence was conflicting or confusing in some respects, since the court on appeal can not weigh the evidence. p. 258.
7. **CARRIERS.—Injuries to Passengers.—Burden of Proof.—Contributory Negligence.—Instructions.**—An instruction in a passenger's action for personal injuries informing the jury that the burden was on plaintiff to prove the material allegations of the complaint and that on making such proof he would be entitled to recover, providing it was not shown by defendant that he was guilty of contributory negligence, though incomplete when standing alone in that it confined the establishing of contributory negligence to defendant, was not ground for reversal in view of the fact that the court by another instruction told the jury that it was for the jury to say from all the facts and circumstances of the cause whether or not the plaintiff's own act and conduct constituted contributory negligence. p. 258.

From Vanderburgh Circuit Court; *Duncan C. Givens*, Judge.

Action by William Cosby against the Public Utilities Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

*Robinson & Stilwell*, for appellant.

MORAN, J.—Appellee was suddenly thrown from the rear platform of one of appellant's cars in the city of Evansville, Indiana, while attempting to alight therefrom. He alleges that his fall was caused by the negligence of appellant. On the trial of the cause a verdict was returned in appellee's favor in the sum of \$75. Judgment was rendered on the verdict, and the motion for a new trial overruled, which, together with the overruling of the demurrer to the complaint, constitute the errors presented for consideration in this court. The

complaint, after alleging that appellee be-

1. came a passenger for hire upon one of appellant's street cars in the city of Evansville, Indiana, with his destination at a given point in said city, alleges in substance that when appellee was near his point of destination he informed the conductor in charge of the car that he desired to alight therefrom, and that the conductor signaled the motorman to stop the car, thereupon the speed of the car was reduced and appellee believed that appellant's servants in charge of the car would perform their duty and stop the same at his point of destination, and by reason thereof, stepped out upon the platform and prepared to alight; that appellant's servants had full knowledge of his position, but negligently failed to stop the car, and negligently increased the speed, and after it had passed the point where appellee should have left the car, appellant's servants negligently allowed the car to be

suddenly jerked, by reason of which appellee was thrown from the car with great force and violence and was greatly and permanently injured, without any fault or negligence on his part, which injuries were caused wholly by the negligence of appellant to appellee's damage in the sum of \$1,000.

Upon the sufficiency of the complaint to withstand a demurrer for want of facts, appellant argues that the only theory upon which the complaint could have proceeded was that while appellee was in a position preparatory to alighting the servants in charge of the car with knowledge of his position, negligently allowed the car to give a sudden jerk. But it is insisted that it is not good upon this theory, for the reason that it is not claimed that appellee was thrown from the car at the place where he intended to alight or while in the act of alighting, and that it is alleged only by inference that the servants in charge of the car knew that appellee was in a position preparatory to leaving the car upon the same being stopped, and that he voluntarily placed himself in a dangerous position until injured; and that he was guilty of negligence. As to whether the servants knew of appellee's position at and immediately before the injury, the allegations of the complaint in this behalf are sufficient to charge the servants in charge of the car with knowledge of his position upon the platform.

The relation of carrier and passenger existed between appellee and appellant and it has been held many times that when this relation exists

2. that the carrier, while not an insurer of the safety of its passengers, is charged with the duty of exercising the highest degree of care practicable for the safety of its passengers, and is responsible for an injury caused to a passenger by its

negligence, growing out of the condition of its road, character of its machinery and equipment, and the skill and conduct of its servants and employes, the passenger himself being without fault. *Louisville Ferry Co. v. Nolan* (1893), 135 Ind. 60, 34 N. E. 710; *Lake Erie, etc., R. Co. v. Cotton* (1910), 45 Ind. App. 580, 91 N. E. 253.

“It is usually held not to be negligence *per se*

3. for a passenger to leave his seat and approach the door of the car preparatory to disembarking after his destination has been announced and the train is approaching the station, or to go upon the platform of the car while the train is in motion, preparatory to alighting.” 5 R. C. L. 31, §677. See, also, *Heinze v. Interurban R. Co.* (1908), 139 Iowa 189, 117 N. W. 385, 21 L. R. A. (N. S.) 715; *Young v. Boston, etc., St. R. Co.* (1913), 213 Mass. 267, 100 N. E. 541, 50 L. R. A. (N. S.) 450, Ann. Cas. 1914 A 635; *Washington, etc., R. Co. v. Chapman* (1906), 26 App. Cas. (D. C.) 472; 6 Ann. Cas. 721; *Wellmeyer v. St. Louis Transit Co.* (1906), 198 Mo. 527, 95 S. W. 925. The inquiry is, Was appellee negligent in taking the position he did upon the platform of the car under the circumstances, and remaining there after the car had failed to stop at the point where he was to leave the car? That part of the complaint that becomes material to this inquiry may be paraphrased as follows: That after appellee made known to appellant’s servants in charge of the car that he desired to leave the same when it reached a given point, and that just before reaching the point where appellee had intended to leave the car, the speed of the car was reduced, and under these circumstances appellant took his position at the rear platform of the car preparatory to alighting, and while in this position, appellant’s servants in charge of the car failed

to stop the same, and negligently increased the speed to a high and dangerous rate, and shortly after passing the point where appellee would have disembarked had the car stopped, as appellee expected it would, appellant's servants negligently allowed the car to give a sudden and unexpected jerk by reason of which appellee was thrown from the car and injured. "It is probably more dangerous to ride upon the platform than within the car, and the passenger by taking such position assumes the risks which naturally ensue from that position. That is to say, if the company runs its cars in a prudent manner, and the passenger falls off and is injured, that is a risk he assumed by standing upon the platform; but if he has exercised due care (which is usually a question for the jury), and is injured because of the negligence of the company in running its car, the company can not be heard to say that he has no right of action against it, when it is responsible for the practice which resulted in his injury." *Capital Traction Co. v. Brown* (1907), 29 App. Cas. (D. C.) 473, 12 L. R. A. (N. S.) 831. Under the facts pleaded, it can not be said as a matter of law that appellee occupying the position that he did while the car was in operation and under the circumstances was guilty of negligence; and the court did not err in leaving it to the jury as a question of fact. *Terre Haute Elec. R. Co. v. Lauer* (1899), 21 Ind. App. 466, 52 N. E. 703; *Greenawaldt v. Lake Shore, etc., R. Co.* (1905), 165 Ind. 219, 74 N. E. 1081; *Indiana Union Traction Co. v. Love* (1913), 180 Ind. 442, 99 N. E. 1005.

The charge of negligence alleged in the com-

4. plaint on the part of appellant is sufficient.

No error was committed by the court in overruling the demurrer to the complaint.



The only error urged by reason of the overruling of the motion for a new trial under "Points and Authorities" is that the verdict is not sus-

5. tained by sufficient evidence; and in the giving of instruction No. 8 by the court of its own motion. As to the error based on the insufficiency of the evidence to support the verdict, it presents for our consideration the question as to whether there is any evidence in support of the verdict; that is, if the verdict is supported in every material respect, although the evidence may not be entirely satisfactory, it will not present a question of law calling for a reversal of the cause. *Thompson v. Beatty* (1909), 171 Ind. 579, 86 N. E. 961. The evidence in the main follows the allegations

6. of the complaint, and while it is somewhat confusing as to the manner in which appellee was thrown from the car, it is, however, sufficient to sustain the verdict. No error was committed in overruling the motion for a new trial in this respect, as it is well settled that this court cannot weigh the evidence when it is conflicting, for the purpose of determining the preponderance. *Cleveland, etc., R. Co. v. Christie* (1912), 178 Ind. 691, 100 N. E. 299; *Wellington v. Reynolds* (1912), 177 Ind. 49, 97 N. E. 155 *Espenlaub v. Hedderick* (1913), 52 Ind. App. 139, 100 N. E. 382.

This leaves for consideration the error predicated upon the giving of instruction No. 8 by the court of its own motion. This instruction informed

7. the jury that the burden was upon appellee to prove the material allegations of his complaint by a preponderance of the evidence, and if he did so he was entitled to recover, providing it was not shown by the appellant that appellee was guilty of contributory negligence. This instruction when standing alone is incomplete, as it confines the es-

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tablishing of contributory negligence to appellant when it is sufficient if established from all of the evidence by whomsoever adduced. *Cleveland, etc., R. Co. v. Carey* (1904), 33 Ind. App. 275, 71 N. E. 244. But by instruction No. 6 the jury was informed that it was for the jury to say from all the facts and circumstances of the cause whether or not the plaintiff's own act and conduct constituted contributory negligence. When instruction No. 8 is read in connection with instruction No. 6, no error was committed by the court in giving this instruction.

No available error being shown by the record, judgment is affirmed.

NOTE.—Reported in 110 N. E. 576. As to degree of care required of carrier of passengers, see 118 Am. St. 465. As to negligence in starting street car with jerk, see 23 L. R. A. (N. S.) 891; 34 L. R. A. (N. S.) 225. As to presumption of negligence from sudden start, stop, jolt, or jerk of car, see 13 L. R. A. (N. S.) 611; 29 L. R. A. (N. S.) 814. As to negligence of passenger in going upon platform or steps of car just before reaching his station, see 21 L. R. A. (N. S.) 715. As to the liability of a railroad for injuries received by passenger riding on platform, see Ann. Cas. 1914 A 563. See, also, under (1) 6 Cyc 626; (2) 6 Cyc 590, 591; (3) 6 Cyc 645; (5) 3 Cyc 348; (6) 3 Cyc 349; (7) 38 Cyc 1749.

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### ANSEL, ADMINISTRATOR v. KYGER.

[No. 9,267. Filed December 8, 1915.]

1. APPEAL.—*Right to Appeal*.—In order that a party may be entitled to appeal from the final action of a trial court, it must appear that he has a substantial interest in the subject-matter of the litigation, and that he is prejudiced or aggrieved substantially by the judgment or decree from which he seeks to appeal. p. 262.
2. APPEAL.—*Right to Appeal*.—*Administrator*.—Unless the estate he represents is prejudiced by a judgment or decree, the administrator as such is not authorized to appeal therefrom; hence, where one who was administrator was prejudiced in his individual capacity by an order made in the interest and for the benefit of the estate which he represented, he could not in his official capacity complain of such order and an appeal by him as administrator would not lie. p. 262.

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3. APPEAL.—*Right to Appeal.*—*Administrator.*—*Parties.*—The administrator of an estate is not entitled to a hearing on appeal from an order affecting his trust, even though the trust is prejudiced by such order, unless all whose interests are antagonistic to his interests are properly before the court. p. 262.

From Knox Circuit Court; *Ben. M. Willoughby*, Judge.

Proceedings in the matter of the estate of Catherine Ansel, deceased. From an order on exceptions filed by the guardian of Omar Kyger to an inventory of the estate returned by Henry D. Ansel, administrator, the latter appeals. *Appeal dismissed.*

*S. J. Ghee, David H. Byers and S. M. Emison*, for appellant.

*Wade & Padgett*, for appellee.

CALDWELL, J.—The decedent, Catherine Ansel, died in August, 1914, leaving surviving her as her only heirs at law the appellant, Henry D. Ansel, her husband, and Omar Kyger, her son, who was under the age of twenty-one years, and who is named as appellee. Thereafter appellant was regularly appointed administrator of the personal estate of decedent by the Knox Circuit Court, and took upon himself the execution of the involved trust. In October, 1914, appellant administrator returned to the clerk's office of the court an inventory and appraisement of the personal effects of the estate. Thereupon, appellee, by his guardian, William H. Kyger, through the instrumentality of certain exceptions filed to the inventory and appraisement, brought to the attention of the court that certain items of personal property alleged to be assets of the estate had been omitted from the inventory and appraisement. These alleged omitted articles consisted of a credit with a savings association in the sum of \$1,800, and also certain articles of ornament and apparel. At a hearing before the court, Henry

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D. Ansel urged in justification of his failure as such administrator to inventory the omitted property that he had no knowledge of the existence of the articles of apparel and ornament, and that the credit in the sum of \$1,800 was his individual property rather than assets of the estate, and that after the decease of his wife, he had caused such credit to be transferred to his individual account, and that he claimed it as his own free from any right of the estate therein. The hearing resulted in the exceptions being sustained as to the credit and overruled as to the other items, whereupon the court entered an order that appellant as administrator inventory the credit item in the sum of \$1,800.

Appellant, as administrator filed his motion for a new trial, which was overruled, and he, as administrator, reserved an exception, and, as administrator, he now prosecutes this appeal.

Henry D. Ansel, in his individual capacity, is not a party to the appeal. In his capacity as administrator he appears only as appellant, and in such capacity he assigns error. At the hearing in the trial court, the contest involved only the conflicting claims of the estate and Henry D. Ansel as an individual respecting the ownership of the \$1,800 item. That contest was determined in favor of the estate represented by Henry D. Ansel, as administrator, and against him as an individual, and to the effect that that item is the property of the estate rather than the property of Ansel as an individual. In this court, he, as administrator, in contravention of his trust as such, assigns error whereby he, as administrator, complains of the action of the trial court, by which the assets of the estate have been augmented, and asks the judgment of this court that such assets be depleted by delivering to him as an individual the property in dispute, and this he seeks

to do without bringing before this court as an appellee, the administrator whose duty it is and who is authorized to protect the estate. On these facts appellee moves the court to dismiss the appeal.

In order that a party may be entitled to appeal from the final action of a trial court, it must appear that he has a substantial interest in the

1. subject-matter of the litigation, and that he is prejudiced or aggrieved substantially by the judgment or decree from which he seeks to appeal.

It follows that unless an estate is prejudiced by a judgment or decree, the administrator there-

2. of as such is not authorized to appeal therefrom. If the judgment or decree is substantially favorable to the estate, and its effect is to increase its assets, the administrator in seeking, as such, to annul it, is plainly acting to the prejudice of his trust. Moreover, an appealing party is not

entitled to an *ex parte* hearing in an appel-

3. late tribunal where the action is adversary in nature. If an administrator, as such, has such an interest in the involved judgment or decree as entitles him as such administrator to appeal therefrom, and if such judgment or decree affects his trust adversely, still he is not entitled to a hearing in an appellate tribunal unless by proper proceedings those whose interests are antagonistic

2. to his interests are brought before the court.

The entire matter sought to be presented for our consideration by this appeal was determined by the trial court in favor of the trust represented by appellant and against his interests as an individual. Appellant, as administrator, is interested in preserving the order as entered; as an individual, he is interested in annulling it. As an individual, he is interested in maintaining the cause of appellant, while in his trust capacity, he can not perform

the duties of his trust without championing the cause of appellee. It is, therefore, apparent that this appeal can not be considered, for the reason that appellant, as administrator, can not be heard to complain of the action of the trial court, the effect of which is to augment the assets of the estate, and also for the reason that the administrator whose duty it is to protect the estate, is not brought before this court as an appellee. The appeal must be dismissed. See the following: §2977 Burns 1914, §2454 R. S. 1881; *Moore v. Ferguson* (1904), 163 Ind. 395, 72 N. E. 126; *Case v. Nelson* (1899), 22 Ind. App. 22, 52 N. E. 176; *In re Barker's Estate* (1902), 26 Mont. 279, 67 Pac. 941; *Succession of Hartigan* (1899), 51 La. Ann. 126, 24 South. 794; *In re Switzer* (1906), 119 Am. St. 741, 749 note; 18 Cyc 1210; 2 R. C. L. 52. The motion to dismiss the appeal is sustained, and the same is dismissed.

NOTE.—Reported in 110 N. E. 559. See, also, under (1) 3 C. J. 623, 629; 2 Cyc 628, 631; (2) 3 C. J. 631; 2 Cyc 640, 641; (3) 3 C. J. 1003; 2 Cyc 756.

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SMITH v. SMITH.

[No. 9,268. Filed December 8, 1915.]

1. APPEAL.—*Costs.—Motion to Retax.—Notice.*—Where a motion was filed to retax the costs with respect to docket fees taxed on appeal, the notice of the motion was properly served on the attorney-general, under §9269 Burns 1914, Acts 1899 p. 124, since such fees are taxed for the benefit of the State. p. 264.
2. APPEAL.—*Costs.—Docket Fees.—“Submission”.*—Section 9389 Burns 1914, Acts 1907 p. 92, providing for the taxation of a docket fee against the losing party as a part of the costs on appeal, except in the event the cause is dismissed by appellant before submission to the court, discloses no legislative intent that the

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exception was intended to apply in all cases where the cause was dismissed before distribution for decision, since the word "submission" as applied to causes pending on appeal has a well understood meaning and the time for submission is expressly fixed by §693 Burns 1914, Acts 1885 p. 219, while no time certain is fixed for the distribution. p. 264.

From Howard Circuit Court; *Warren R. Voorhis, Special Judge.*

Action between Myrtle M. Smith and James G. Smith. From the judgment rendered, the former appealed. The appeal was dismissed on motion of appellant, who subsequently moved to retax the costs. *Motion to retax overruled.*

*Harness & Moon*, for appellant.

HOTTEL, J.—On April 24, 1915, appellant filed in the Supreme Court the transcript of the record in this cause. On April 29, 1915, on appellant's motion of same date the cause was transferred to this court. On May 24, 1915, the cause was submitted under §693 Burns 1914, Acts 1885 p. 219. On August 9, 1915, appellant filed a written dismissal of the appeal showing therein that the case had been compromised by the parties. The clerk has taxed against the appellant two docket fees, one in the Supreme Court and one in this court.

Appellant has filed a motion to retax the costs in respect to such items, and has served proper notice of such motion on the attorney-general. Such fees

being taxed for the benefit of the State the

1. notice to the attorney-general was proper.

§9269 Burns 1914, Acts 1899 p. 124.

We are therefore required to determine whether said fees are authorized by statute. This question

is controlled by §9389 Burns 1914, Acts

2. 1907 p. 92, which provides that as a part of

the costs of a case on appeal \$10 shall be taxed to the losing party "in each civil and each criminal



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case, filed in either the supreme or appellate court,  
\* \* \* *Provided, That if a cause shall be by the appellant dismissed before a submission to the court, no docket fee shall be taxed or collected*". (Our italics.) Appellant, in effect concedes that the fees here taxed were authorized under the law as it existed prior to the act of 1901 (Acts 1901 p. 565, §18, being §1337r Burns 1901, as construed in the case of *Stafford v. Conwell* (1905), 36 Ind. App. 313, 75 N. E. 600, but insists that by the proviso of such later act, above quoted, the legislature evidenced an intention to change the law as laid down in that case. This is no doubt true, but such proviso evidences an intention on the part of the legislature to relieve from taxation of such fees those cases only which are dismissed "before a submission to the court".

We can not agree with appellant's contention that by the use of the word "*submission*" in said proviso the legislature intended and meant "*distribution*". There is nothing in the wording of the act to indicate any such intention. The word "*submission*" as applied to a case pending in the appellate tribunal has a well understood meaning. The "*submission*" of a cause "*for decision*" and the time therefor is expressly fixed and provided for by §693 Burns 1914, *supra*, while no time certain or definite is fixed for the distribution of a case. Appellant's motion is therefore overruled.

NOTE.—Reported in 110 N. E. 558.

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## JONES ET AL. v. THE CHATFIELD & WOODS COMPANY.

[No. 8,917. Filed December 8, 1915.]

1. PLEADING.—*Complaint*.—*Amendment*.—The filing of an amended complaint takes the original from the record. p. 268.
2. APPEAL.—*Review*.—*Amended Complaint*.—*Exceptions to Ruling on Demurrer to Original*.—Where appellants' demurrer to the com-

plaint was overruled, the subsequent filing of an amended complaint took out of the record the exceptions reserved on the overruling of the demurrer to the original complaint. p. 268.

3. APPEAL.—*Assignment of Errors.*—*Review.*—Reversal can not be predicated on an assignment of error in sustaining a demurrer to a second paragraph of answer, where the only second paragraph of answer appearing in the record was addressed to the original complaint and filed prior to the filing of an amended complaint. p. 268.
4. APPEAL.—*Questions Reviewable.*—*Ruling on Motion for New Trial.*—Where the evidence is not in the record, and no complaint is made as to the special finding of facts, no question is presented on the overruling of the motion for a new trial. p. 269.

From Owen Circuit Court; *James B. Wilson, Judge.*

Action by The Chatfield & Woods Company against Winfield Jones and others. From a judgment for plaintiff, certain defendants appeal. *Affirmed.*

*John A. Riddle* and *A. M. Beasley*, for appellants.

*William L. Slinkard* and *Will R. Vosloh*, for appellee.

MORAN, J.—On February 1, 1904, appellee commenced an action in the Greene Circuit Court, against appellants, Charles F. and Winfield Jones, to recover an indebtedness alleged to be due appellee from said appellants, and after the commencement of the action upon application of appellee a writ of attachment issued against the property of appellants, Jones and Jones, consisting of a printing press and other chattel property. On February 13, 1904, appellants, Jones and Jones, as principals, and appellants, Terrence Carroll and John A. Riddle, as sureties, executed a delivery bond upon the approval of which the property attached was turned over to appellants, Jones and Jones. Upon a trial of the cause, judgment was rendered against said appellants in the sum of \$743.59 and costs, together with

judgment in attachment. On March 31, 1909, an action was instituted by appellee against all of appellants in this cause on the delivery bond on the grounds that there was a breach of the bond in that appellants disposed of the property attached, except a portion thereof of the value of \$200. Upon issue being joined and a trial had in the Owen Circuit Court, where the cause had been venued, judgment was rendered against all appellants in the sum of \$807.93.

A review of the judgment is sought by appellants, Terrence Carroll and John A. Riddle. The names of appellants, Jones and Jones, appear in the caption of the assignment of errors, but no error is assigned by them. The errors assigned by appellants, Terrence Carroll and John A. Riddle, are, (1) overruling of the separate demurrer to the complaint, (2) sustaining the demurrer of appellee to the second paragraph of the joint and separate amended answer of said appellants, (3) overruling the motion for a new trial.

Appellee very earnestly insists that the infirmities of the record are such that neither of the errors relied on can be considered. On May 3, 1909, a demurrer was filed to the complaint by appellants, Carroll and Riddle, on the ground that the complaint did not state facts sufficient to constitute a cause of action against them. On September 8, 1909, the demurrer was overruled and exceptions reserved. On September 27, 1909, appellants, Carroll and Riddle, filed an answer in two paragraphs, the first being an answer in general denial, the second an affirmative paragraph based upon the theory that the property attached, and for the delivery of which the bond was executed, was not the property of Charles E. and Winfield Jones; that one Moss held a first mortgage on the same, which antedated the

writ of attachment as against the printing press, in the sum of \$3,000, and that the balance of the property was owned by persons other than Jones and Jones, and that subsequent to the issuing of the attachment the property mortgaged was seized by the mortgagee on a writ of replevin. On December 3, 1909, a demurrer to the affirmative paragraph of answer was sustained and an amended second paragraph of answer was filed, to which a demurrer was sustained. A third effort made to amend met the same fate. On February 14, 1910, appellee filed an amended complaint, which took the original

1. complaint out of the record. *Weaver v. Apple* (1897), 147 Ind. 304, 46 N. E. 642; *Scott v. Lafayette Gas Co.* (1908), 42 Ind. App. 614, 86 N. E. 495. The record shows that no demurrer was addressed to the amended com-

2. plaint. An order book entry bearing date of December 2, 1910, discloses the following: "Come again the parties hereto by their attorneys and the defendants file an answer herein in words and figures as follows, to wit": But no answer appears in the record at this place. But on December 16, 1911, an answer affirmative in its nature and denominated a "substitute answer" was filed, to which was addressed a reply in general denial. The substituted answer is the only answer addressed to the amended complaint. Upon the issues thus formed the judgment sought to be reviewed rests. The filing of an amended complaint took out of the record the exceptions that appellants reserved on the ruling on the demurrer to the original complaint. *Elliott*, App. Proc. §595; *Weaver v. Apple*, *supra*; *Kempton Lodge, etc. v. Mozingo* (1913), 180 Ind.

566, 103 N. E. 411. No second paragraph of

3. answer, as designated in the assignment of errors, was addressed to the amended com-

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plaint, therefore there can be no error predicated on this assignment of error. *Kempton Lodge, etc. v. Mozingo, supra.*

This leaves for consideration the third assignment of error, viz., the overruling of the motion for a new trial. The evidence is not before

4. us. The facts were specially found by the court and conclusions of law stated thereon. No complaint is made, however, as to the facts thus found by the court. There is no error presented, which entitled appellants to a new trial. *Lusch v. Pool* (1904), 32 Ind. App. 340, 69 N. E. 687.

The state of the record is such that it precludes an examination of the cause upon its merits. Judgment affirmed.

NOTE.—Reported in 110 N. E. 561. See, also, under (1) 31 Cyc 465; (2) 31 Cyc 466; (4) 3 Cyc 175.

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## SUPREME LODGE OF MODERN AMERICAN FRATERNAL ORDER v. MILLER.

[No. 8,659. Filed December 9, 1915.]

1. **CONTRACTS.—Power to Contract.—Enforcement.**—All persons who are competent may contract with each other as they please and the courts will enforce their agreements if the same are legal and not against public policy. p. 271.
2. **INSURANCE.—Warranties.—Breach.**—Where it is agreed that the application for insurance shall be a part of the policy, and the statements in such application are warranted to be true, such statements will be deemed to be material, and if they are false there can be no recovery on the policy, regardless of whether they were innocently made or otherwise; and, even where such statements are construed merely as representations, there can be no recovery if they were material to the risk and were untrue. p. 271.
3. **INSURANCE.—Warranties.—Breach.—Evidence.**—Where the applicant for a benefit certificate stated in his application that he had never received sick benefits, that he had never been rejected as an applicant for insurance, that there was nothing in his physical condition or personal history tending to impair or shorten his life, that he had suffered no illness not specifically inquired about, and

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had never had any disease of the abdominal viscera or chronic ulcers, and that he had never consulted a physician, such statements were material to the risk, so that on uncontradicted proof that the statements regarding sick benefits and other insurance were not true a rescission of the contract was warranted, in the absence of a waiver, regardless of whether they be considered as warranties or as representations. p. 272.

4. **INSURANCE.—Action on Policy.—Evidence.—Verdict.**—Where the uncontradicted evidence showed that statements in the application material to the risk were untrue, and that the insurer immediately rescinded the contract upon learning of their falsity, and tendered back the premiums received, a verdict for plaintiff in an action on the policy was in conflict with the evidence and not in accord with the principles of law controlling such cases. p. 274.
5. **APPEAL.—Review.—Instructions.**—In an action on a policy of insurance where the question of the construction of the contract was solely for the court, as was also the question of whether defendant had made a timely rescission of the contract, the court erred in instructing the jury that it should determine the facts and say whether such facts showed a disaffirmance within a reasonable time, as well as in giving instructions that were outside the issues and misleading. p. 274.

From Superior Court of Allen County; *Ed. O'Rourke*, Judge.

Action by Lydia Miller against the Supreme Lodge of Modern American Fraternal Order. From a judgment for plaintiff, the defendant appeals. *Reversed.*

*Leonard, Rose & Zollars*, for appellant.

*William C. Ryan* and *Charles J. Ryan*, for appellee.

**IBACH, C. J.**—Appellee, beneficiary of her husband, John Miller, deceased sued appellant to recover the amount of a fraternal insurance policy issued by it on the life of her said husband. The answer of appellant is a breach of the warranties contained in the application upon which the beneficiary certificate was issued and which by the terms of such certificates becomes a part of it. The reply stated that statements made to the appellant's medical examiner by the decedent were true, but

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that in certain respects the medical examiner had not truthfully recorded his answers in the application. A trial by jury resulted in a verdict for appellee for the amount of the certificate, \$1,000. The court overruled appellant's motion for new trial and entered judgment on the verdict. The overruling of this motion is the only error assigned.

John Miller, the insured, in his application for insurance warranted his answers to the several questions contained in the medical examination to be true and agreed that such answers should constitute a part of the contract between himself and appellant and that the same should be binding upon him and his beneficiary and further agreed that any false statement in such answers or any of them or in any part of any of them should render the contract null and void, and forfeit the rights of him-

1. self or beneficiary to all benefits under the policy. All persons who are competent are at liberty to contract with each other as they may desire, and the courts will enforce such contracts if legal and not against public policy when called

2. upon so to do. With respect to insurance contracts, the rule in this State seems to be that where it is expressly agreed that the application for life insurance shall be a part of the certificate or policy and the statements in such application are warranted to be true, such statements will be deemed material, and if proven to be false, there can be no recovery on the policy, whether they were made innocently or not. *Catholic Order of Foresters v. Collins* (1912), 51 Ind. App. 285, 99 N. E. 745. The applications and certificate involved in this case plainly show that the answers were intended by both parties to be treated as warranties, but if they were construed merely as representations, it would make no difference in our holding, for the answers



which were proved to be false were material to the risk.

In his application the insured, in substance, made the following statements: that he had never received sick benefits from any other society;

3. that he had never applied to any company for insurance without receiving a policy of the exact kind applied for; that there was nothing in his physical condition or personal history tending to impair or shorten his life; that he had never had any disease of the abdominal viscera or chronic ulcers; that he had had no illnesses not specifically inquired about; that he then had no physician; and that he had never consulted a physician. The uncontradicted evidence shows that the assured had upon three different occasions, been paid sick benefits from the Eagles' society for disabling sickness covering a period of fourteen weeks; and that but a few months before the date of the application he had applied for reinstatement in the Bankers Life Insurance Company of Iowa and had been refused; that he had consulted with and been treated by several physicians during the three years immediately preceding the time of application; that he had been treated for gastritis of the stomach, ulcers and syphilis, and at one time a conference of physicians was held with a view of performing a major operation to relieve him from his troubles. There was some evidence tending to show that the doctor who wrote the answers to the questions contained in the application relating to diseases and certified to making a medical examination, had not made a complete examination, and had falsified some of Miller's answers and filled in other blanks without asking him the questions and that such physician knew that the appellant was complaining of stomach trouble when the application

was made. It is unnecessary for us to discuss the legal effect to be given the conduct of the physician as shown by some of the evidence relating to the foregoing. It is sufficient to state that there is no evidence showing or tending to show that the statements made by the insured that he had not received sick benefits from other societies and had never been refused insurance on application, and that he had not consulted physicians theretofore, were not written exactly as Miller had stated them and there is no contention but that they were written just as they were made. Indeed by appellee's reply it was admitted that the answers relating to sick benefits and other insurance were written as made, and that such answers as made were in fact true. Appellee's contention is that there is no evidence to show these particular answers were untrue. With this contention we can not agree, for all the evidence in regard to sick benefits, and other insurance are entirely uncontroverted by appellee's evidence, and whether they be construed as representations or warranties, they were made with reference to facts material to the risk, and afforded ground for the prompt rescission of the contract, unless there has been a waiver of such false statements, which is not the case here. *Union Cent. Life Ins. Co. v. Hollowell* (1897), 20 Ind. App. 150, 153, 50 N. E. 399; *Iowa Life Ins. Co. v. Haughton* (1910), 46 Ind. App. 467, 472, 87 N. E. 702; *Security, etc., Ins. Co. v. Webb* (1901), 106 Fed. 808, 45 C. C. A. 648, 55 L. R. A. 122; *Eddington v. Aetna Life Ins. Co.* (1879), 77 N. Y. 564, 568. 4 Elliott, Contracts §§4118, 4380, 4381.

Upon the question of rescission there is no dispute in the evidence, for it appears therefrom that immediately upon learning that Miller had received

sick benefits from other societies and had  
4. made application for other insurance which had been refused, appellant immediately rescinded the contract of insurance and tendered back the amount of premiums received by it. We fail to see what good purpose can be accomplished by discussing the evidence received on these propositions, for after all it is apparent that the uncontradicted evidence establishes a state of facts in direct and irreconcilable conflict with the verdict, and the judgment rendered on the verdict is not in accord with the principles of law controlling such cases.

Certain instructions are also questioned by appellant, and we need not consider them separately, it is sufficient to say that the construction of  
5. this particular contract was exclusively for the court. It is in writing, plain and unambiguous, and the jury under all the circumstances of the case had nothing to do with its construction. *Union Life Ins. Co. v. Jameson* (1903), 31 Ind. App. 28, 31, 67 N. E. 199. Neither was there any dispute with reference to the evidence relating to the knowledge which appellant had acquired of the breach of the warranties enumerated and the facts connected with the rescission of the contract, so that the question as to whether there was a timely rescission of the contract of insurance, under the facts of this case, was also one exclusively for the court and not for the jury. *Metropolitan Life Ins. Co. v. Frankel* (1915), 58 Ind. App. 115, 103 N. E. 502; *Insurance Co. of North America v. Brim* (1887), 111 Ind. 281, 12 N. E. 315; *Baker v. German Fire Ins. Co.* (1890), 124 Ind. 490, 24 N. E. 1041; *Morgan v. McKee* (1874), 77 Pa. St. 228; *Nickey v. Zonker* (1903), 31 Ind. App. 88, 67 N. E. 277. Consequently there was error in giving the instruc-

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tion complained of which informed the jury that it was for it to determine the facts, although undisputed, and was for it to say as a matter of law whether the facts showed a disaffirmance within a reasonable time.

Other instructions given were outside the issues and the effect which would necessarily follow therefrom would be to confuse and mislead the jury. Error in giving such instructions can not be regarded as harmless. *Summerlot v. Hamilton* (1889), 121 Ind. 87, 91, 22 N. E. 973.

The commission of the indicated errors requires the reversal of the judgment. Judgment reversed.

NOTE.—Reported in 110 N. E. 556. As to misrepresentations by assured as to health, see 3 Am. St. 634. As to forfeiture of life insurance by false representations with respect to previous applications for insurance, see 55 L. R. A. 122. See, also, under (1) 9 Cyc 587; (2) 25 Cyc 805, 806; (3) 29 Cyc 89; (5) 38 Cyc 1511, 1602, 1612.

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### THE MANTLE LAMP COMPANY v. BONICH.

[No. 9,382. Filed December 9, 1915.]

1. APPEAL.—*Right of Appeal.—Amount in Controversy.*—An appeal does not lie from the judgment against plaintiff in an action originally filed before a justice of the peace for the recovery of a sum less than fifty dollars, and in which no question is involved to bring the case within the exceptions provided by §§671, 1391 Burns 1914, §632 R. S. 1881, Acts 1901 p. 565. p. 276.
2. APPEAL.—*Right of Appeal.—Amount in Controversy.*—Where the circuit court sustains a demurrer to the complaint and, on refusal to amend, renders judgment for the defendant, in an action commenced before a justice of the peace, the amount in controversy as affecting the right to appeal is to be determined from the complaint. p. 276.

From Lake Superior Court; *Charles E. Greenwald*, Judge.

Action by The Mantle Lamp Company against John Bonich. From a judgment for defendant, the plaintiff appeals. *Appeal dismissed.*

*Dwight M. Kinder*, for appellant.

*Bomberger, Curtis, Starr & Peters* and *H. D. Davis*, for appellee.

HOTTEL, J.—This is an appeal from the Lake Superior Court in a cause which originated before a justice of the peace wherein appellant sought to recover of appellee \$44.50 for merchandise sold and delivered to another on appellee's letter of credit. A demurrer to the complaint was sustained, and appellant refusing to amend, judgment was rendered for appellee. The ruling on said demurrer is

relied on by appellant as constituting re-

1. versible error. Appellee has filed a motion to dismiss the appeal on the ground that this is an action which originated before a justice of the peace and that the amount in controversy is less than \$50. It is contended by appellee that such a case is made nonappealable by §§671, 1389 Burns 1914, §632 R. S. 1881, Acts 1903 p. 280. This contention is supported by the express language of the statute and by the construction placed thereon by both the Supreme Court and this court. This case falls within neither of the exceptions mentioned in either §671, *supra*, or §8 of the act approved March 12, 1901, Acts 1901 p. 565, the latter exceptions being §1391 Burns 1914, nor is it controlled by the cases of, *Hall v. Durham* (1888), 113 Ind. 327, 15 N. E. 529; *Strebin v. Myers* (1908), 42 Ind. App. 381, 85 N. E. 784; *Knowlton v. Smith* (1904), 163 Ind. 294, 71 N. E. 895, relied on by appellant.

Where, as in this case, the plaintiff brings his action before a justice of the peace and seeks to recover a money judgment, and by his com-

2. plaint shows the amount in controversy to be less than \$50 and the trial court sustains a demurrer to such complaint and judgment is rendered for the defendant, "the amount in controversy"

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for the purposes of §671 or §1389, *supra*, is necessarily determined from the complaint. *Schultz v. Alter* (1915), *ante* 245, 110 N. E. 230, and cases cited; *Colliery Engineer Co. v. American Car, etc., Co.* (1901), 157 Ind. 111, 112, 60 N. E. 941, and cases cited; *Chicago, etc., R. Co. v. Ebersol* (1910), 173 Ind. 332, 90 N. E. 608; *City of Greensburg v. Cleveland, etc., R. Co.* (1899) 23 Ind. App. 141, 55 N. E. 46. The appeal is therefore dismissed.

NOTE.—Reported in 110 N. E. 558. See, also, under (1) 3 C. J. 380; 2 Cyc 561; (2) 3 C. J. 403; 2 Cyc 559.

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## DEER, ADMINISTRATOR v. THE SUCKOW COMPANY.

[No. 8,811. Filed December 14, 1915.]

- 1 APPEAL.—*Review.*—*Instructions.*—*Record.*—Notwithstanding the memorandum placed by the trial court at the close of the instructions was dated April 9, and the record entry showed that on April 10 the instructions were read to the jury to the reading of which oral exceptions were at the time reserved, that all the instructions were signed by the court, filed with the clerk and ordered made a part of the record, etc., the instructions were a part of the record under §561 Burns 1914, Acts 1907 p. 652; the fact that they were signed by the court before they were read to the jury being immaterial. p. 279.
2. MASTER AND SERVANT.—*Injuries to Servant.*—*Assumption of Risk.*—*Contributory Negligence.*—*Burden of Proof.*—*Statutes.*—Under the act of March 2, 1911 (Acts 1911 p. 145, §§8020a-8020k Burns 1914), where negligence of the employer is shown, the defense of assumption of risk and of contributory negligence, because of dangers and hazards inherent in the employment, are removed, and the burden of proving that the employer did not know of the defect alleged to constitute negligence, or was not chargeable with knowledge, is placed on the employer. p. 280.
3. MASTER AND SERVANT.—*Injuries to Servant.*—*Assumption of Risk.*—*Contributory Negligence.*—*Statutes.*—Under §8020c Burns 1914, Acts 1911 p. 145, §3, where plaintiff employe has proved the defect alleged he has made a *prima facie* case of negligence against the employer, and can not be charged with assumption of the risk in the absence of proof that the employer did not know of the defect, or was not chargeable with constructive knowledge thereof; nor is the employe chargeable with contributory negligence be-

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- cause of a risk inherent in the employment, even though having knowledge thereof; hence in an action under the statute, the court erred in instructing the jury that plaintiff assumed the ordinary risks of the employment and that he could not recover if he knew or could have known of the defect complained of. p. 281.
4. NEGLIGENCE.—*Ordinary Care*.—Ordinary care is the care of an ordinarily prudent person and not that of a prudent person. p. 283.
5. MASTER AND SERVANT.—*Injuries to Servant*.—*Defective Conditions*.—*Inspection by Servant*.—*Instructions*.—In an action under the statute, an instruction that plaintiff could not recover if the dangerous condition could have been seen by decedent, and stating that defendant was under no greater obligation to use care for the safety of decedent than he was to care for himself, was erroneous, since even at common law a servant is not bound to make a critical examination of a tool or appliance, or of his working place, before using it, and there is a duty of inspection devolving upon the master that is not required of the servant. p. 283.
6. EVIDENCE.—*Admissibility*.—*Mortality Tables*.—Mortality tables are admissible in evidence upon the question of the life expectancy of decedent in an action for his wrongful death, without regard to whether evidence has been introduced as to decedent's manner of life or physical condition prior to and at the time of the injury, since such tables afford some evidence which the jury may consider along with other pertinent evidence in ascertaining the probable duration of the life in question, and are not admitted as fixing the expectancy of such life, or as forming a legal basis for a calculation. p. 284.

From Johnson Circuit Court; *Wm. E. Deupree*, Judge.

Action by Lewis M. Deer, administrator of the estate of Joseph E. Deer, deceased, against The Suckow Company. From a judgment for defendant, the plaintiff appeals. *Reversed*.

*Ivory J. Drybread* and *Wm. Featherngill*, for appellant.

*L. Ert Slack*, for appellee.

IBACH, J.—This is an action for damages by Lewis M. Deer, administrator of the estate of Joseph E. Deer, deceased, against appellee, a corporation employing five or more persons and engaged in the milling business and manufacture of flour in the



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city of Franklin, Indiana, for injuries sustained by decedent, and resulting in his death, and alleged to have been caused by appellee's negligence. Trial by jury resulted in a verdict for appellee. The only error assigned is the overruling of appellant's motion for new trial.

Errors are argued relative to the giving of several instructions on the court's own motion, and at the request of appellee. Appellee urges that the

1. instructions are not properly in the record under §561 Burns 1914, Acts 1907 p. 652.

The record shows that on April 9, 1913, the evidence was concluded and the argument of counsel heard, and under date of April 10, 1913, there is the following entry: "Come now the parties herein by their attorneys. Comes also the jury heretofore sworn. Instructions Nos. 1 to 6 inclusive tendered by the defendant, are read to the jury, to the reading of each of which to the jury the plaintiff at the time objects and excepts. Instructions Nos. 1 to 32 inclusive tendered by the court are read to the jury, to the reading of each of which to the jury the plaintiff and defendant each separately and severally for himself and itself at the time object and except, and all instructions are signed by the court, filed with the clerk and ordered made a part of the record, which is now done, and which instructions are in the words and figures as follows, to wit": The instructions given by the court appear to have been signed by him on April 9, 1913, and following these instructions is the entry, "Instructions Nos. 1 to 32 inclusive tendered by the court, read to the jury, to the reading of each of which to the jury plaintiff and defendant, each separately and severally for himself and itself at the time objects and excepts. April 9, 1913. Wm. E. Deupree, Judge." Then appears a request of defendant before argu-

ment to the court to instruct the jury in writing, and a request to the court to give to the jury six instructions. These instructions follow, with the marginal notation "Given" on each, and they are not signed immediately at the close of the instructions but the following entry appears: "Instructions Nos. 1 to 6 inclusive tendered by the defendant read to the jury, to the reading of each of which to the jury, plaintiff at the time objects and excepts. April 9, 1913. W. E. Deupree, Judge." It then appears that the jury retired to deliberate on a verdict, and the verdict was returned on April 11, 1913. There was no attempt to make the instructions a part of the record by bill of exceptions, and therefore, if a part of the record, they are such because of the order of the court under date of April 10, 1913. We think however, that a sufficient compliance with §561 Burns 1914, *supra*, is shown, and that the oral exceptions to the instructions given by the court of its own motion are sufficiently shown by the record entry. The mere fact that it is shown that the judge signed the instructions the day before they were given to the jury is immaterial for the statute fixes no particular time for the signing, and there is nothing in the record to indicate that the instructions signed were not given to the jury without change or modification. This is an action under the act approved March 2, 1911. Acts 1911 p. 145, §§8020a-8020k Burns 1914. Under this statute, where negligence of the employer is shown, the defenses of assumption of the risk, and of contributory negligence because of dangers and hazards inherent in the employment are removed, and the burden of proving that the employer did not know of the defect alleged to constitute negligence, or was not chargeable with knowledge, is placed on the employer.

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*Benkowski v. Sanders-Egbert Co.* (1915), 60 Ind. App. 374, 109 N. E. 924.

It is stated specifically in the act (§3 Acts 1911 p. 145, *supra*), that an "employee shall not be held to have assumed the risk of any defect in the

3. place of work furnished to such employee, or in the tool, implement or appliance furnished him by such employer, where such defect was, prior to such injury, known to such employer or by the exercise or ordinary care might have been known to him in time to have repaired the same or to have discontinued the use of such defective working place, tool, implement or appliance. The burden of proving that such employer did not know of such defect, or that he was not chargeable with knowledge thereof in time to have repaired the same or to have discontinued the use of such working place, tool, implement or appliance, shall be on the defendant." Under this section, when a plaintiff employee has proved a defect in a working place, or in an implement, appliance or tool furnished to him by the employer, he has made out a *prima facie* case of negligence against the employer, and he can not be held to have assumed the risk where it has not been proved that the employer did not know of the defect, or was not chargeable with constructive knowledge thereof. Therefore, instructions Nos. 20, 21, 22, in the following words, were erroneous: "No. 20. The decedent, by entering the employment of the defendant company, and engaging in the work he did, as engineer, assumes the ordinary risks and dangers incident thereto, not only so far as they were known to him, but also, so far as they could have been known to him by the exercise or ordinary care upon his part; and if you believe from the evidence, that decedent at and prior to the time of the accident knew the condition of the cup-

board, in question, and the floor surrounding it, or that he could have known its condition and the manner in which it was set and excavated, by the exercise of ordinary care and prudence upon his part, then plaintiff can not recover and in that event your verdict should be for the defendant. No. 21. It was decedent's duty to be careful and to guard against accidents; and if you believe from the evidence that decedent knew the manner in which the cupboard, in question, stood on the floor, and the condition of the floor, or if the condition of the cupboard and floor was apparent and decedent by looking and using ordinary care, could readily have discovered the danger, if any, then your verdict should be for the defendant. No. 22. If decedent knew of the condition of the cupboard and trenches in the engine room, as alleged in the complaint, if they were as alleged, or could have known, if they were of such character as an ordinarily observant person would have known, and the condition of the cupboard or trenches caused the accident, then plaintiff can not recover." Although decedent knew of the condition of the cupboard and the excavation near it which caused it to topple over and crush him when he went to it for a tool, he was not, under the statute, chargeable with contributory negligence because of such a risk inherent in the employment, nor could he be charged with assumption of the risk, where the employer knew of the defect, or was chargeable with constructive knowledge thereof. The instructions above set out omit these elements of the law as stated in the statute under consideration, and were therefore incorrect instructions

There was also error in the giving of instruction No. 12, which stated that the term ordinary care means such care "as would ordinarily be used by prudent persons in the performance of like service under

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the same circumstances, and such as may  
4. be reasonably expected of a person in the situation of the plaintiff's decedent at the time the injury was received, if you find an injury was so received." This instruction imposed on decedent a higher degree of care than the law requires. All that is required is the care of an ordinarily prudent person, not the care of a prudent person. *Toledo, etc., R. Co. v. Goddard* (1865), 25 Ind. 185, 197; *William Laurie Co. v. McCullough* (1910), 174 Ind. 477, 486, 90 N. E. 1014, 92 N. E. 337, Ann. Cas. 1913A 49; *Virgin v. Lake Erie, etc., R. Co.* (1913), 55 Ind. App. 216, 101 N. E. 500; *Louisville, etc., R. Co. v. Falvey* (1886), 104 Ind. 409, 425, 3 N. E. 389, 4 N. E. 908.

Instruction No. 17, which states that if the dangerous location and condition of the cupboard could have been seen by decedent and the accident  
5. avoided, then plaintiff could not recover, is also erroneous, even at common law, for a servant is not bound to make a critical examination of the condition of an implement, or of his working place, before using it; to see if it contains latent defects. This instruction also states that defendant was under no greater obligation to use care for the safety of the decedent than he was to care for himself, and this unqualified statement was, to say the least, misleading, for there is a duty of inspection devolving on the master which is not required of the servant. *Louisville, etc., R. Co. v. Berry* (1891), 2 Ind. App. 427, 431, 28 N. E. 714; *Pittsburgh, etc., R. Co. v. Woodward* (1894), 9 Ind. App. 169, 36 N. E. 442; *Brazil Block Coal Co. v. Gibson* (1903), 160 Ind. 319, 328, 66 N. E. 882, 98 Am. St. 281.

Of the remaining errors assigned, we will consider but one, for the others may not arise on new trial. The court refused to admit in evidence the Carlisle

Table of Mortality, and to allow proof  
6. from such table of the expectancy of life of a person of the age of decedent at the time of the accident, and stated that he would not allow the table in evidence unless plaintiff would introduce evidence as to the manner of life of the decedent for some years prior to the accident. There was evidence that decedent was in good health at the time of the accident, but on appellant's objection all evidence going to show what decedent's manner of life, his habits and conduct had been during the past few years, had not been admitted. Appellee cites the case of *Vicksburg R., etc., Co. v. White* (1903), 82 Miss. 468, 34 South. 331, holding that "when one relies upon the mortality tables to show life expectancy, it then becomes necessary to show that the party belongs to the class," that is, that he is an average person of his age, such as the table is based on. This does not seem to be the rule followed in this State, and approved by the weight of authority. In this State they have been admitted, not "as fixing the expectancy of the life of the particular person, or as forming a legal basis for a calculation, but \* \* \* as furnishing some evidence, to be considered by the jury in connection with all other pertinent evidence, in ascertaining the probable duration of the life in question." *Smiser v. State, ex rel.* (1897), 17 Ind App. 519, 523, 47 N. E. 229. "The physical condition of the person in question, his general health, his avocation in life with respect to danger, his habits and other facts, properly enter into the question, and are to be weighed in connection with the tables." 8 Ency. Evidence 643. The proper procedure seems to be for the court to admit the tables, without proof as to the average health of the person whose expectancy is to be shown, or even if the proof shows that

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his health was below the average. The fact that one is shown to be in poor health does not affect the admissibility of the tables, but goes merely to its force and weight. The court should give the jury proper instructions as to the effect which it may give to such tables, and should admit any evidence tending to show that the person was not an average person of the class contemplated in the tables. *Smiser v. State, ex rel., supra; Galveston, etc., R. Co. v. Leonard* (1894), 29 S. W. (Tex. Civ. App.) 955; *Arkansas Midland R. Co. v. Griffith* (1897), 63 Ark. 491, 39 S. W. 550. Judgment reversed.

NOTE.—Reported in 110 N. E. 700. As to basis of assumption of risk doctrine, see 131 Am. St. 437. On the question of master's construction knowledge as to condition of place of work as element of liability to injured servant, see 41 L. R. A. 45, 50. See, also, under (1) 38 Cyc 1769; (2) 26 Cyc 1410; (3) 26 Cyc 1180, 1229; (4) 29 Cyc 427; (5) 26 Cyc 1204, 1511; (6) 13 Cyc 353; 17 Cyc 422.

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### TUELL v. HOMANN ET AL.

[No. 8,556. Filed April 22, 1915. Rehearing denied June 25, 1915.  
Transfer denied December 15, 1915.]

1. PLEADING.—*Complaint.—Cross-Complaint.—Sufficiency on Motion in Arrest of Judgment.*—A complaint or cross-complaint challenged for the first time by a motion in arrest of judgment, will be treated as sufficient unless some material averment essential to the cause of action has been entirely omitted therefrom. p. 288.
2. APPEAL.—*Questions Presented.—Findings and Conclusions of Law.—Sufficiency of Pleading.*—The sufficiency of pleadings assailed will not be given independent consideration on appeal where the same questions must be determined on consideration of the special finding of facts and conclusions of law. p. 288.
3. TRIAL.—*Exceptions to Conclusions of Law.—Admissions.*—Exceptions to conclusions of law admit for the purpose of such exceptions that the facts were correctly found. p. 291.
4. HUSBAND AND WIFE.—*Contracts of Wife.—Action.—Findings.—Review.*—In an action by a married woman to recover possession of certain real estate and to quiet her title thereto, where it appeared from the findings that an agreement had been entered into by plaintiff to furnish defendants money with which to purchase the real



estate, the title to which was to be in defendants, in consideration that defendants dispose of their property in Illinois and move to Indiana, that defendants performed their part of the agreement and were put in possession of the lands in dispute, which were purchased with the money furnished by plaintiff under such agreement together with money furnished by defendants, and that plaintiff without defendant's knowledge caused the conveyance to be made to her instead of to defendants, the defendants were the holders of the equitable title and entitled to a decree directing a conveyance to them, notwithstanding plaintiff's contention that the contract was the parol contract of a married woman and therefore incapable of enforcement, since the agreement did not relate to the conveyance of real estate but to plaintiff's furnishing of money, and under §7853 Burns 1914, §5717 R. S. 1881, the contracts of a married woman with reference to her personal property are binding on her. p. 291.

5. QUIETING TITLE.—*Action. Against Occupant.—Defenses.—Right to Dispute Plaintiff's Title.*—Where defendants in a suit for possession and to quiet title entered on the land in dispute under a claim of ownership and under the belief that the title was in themselves, the general rule, that a tenant is estopped while in possession to deny the landlord's title, could not be invoked against them. p. 292.
6. NEW TRIAL.—*New Trial as of Right.*—In an action for possession and to quiet title, in which the occupants of the land also sought specific performance of a contract entered into between the parties, a new trial as of right was properly denied. p. 293.

From Sullivan Circuit Court; *Wm. H. Bridwell*, Judge.

Action between Ida Tuell and George Homann and another. From the judgment rendered, Ida Tuell appeals. *Affirmed.*

*John W. Lindley*, for appellant.

*Charles D. Hunt* and *Gilbert W. Gambill*, for appellee.

IBACH, J.—On September 19, 1911, appellant filed her suit against appellee George Homann to recover from him certain lands occupied by him in Sullivan County, Indiana, and to quiet her title thereto. Appellee George Homann filed his answer in general denial, also a cross-complaint for specific performance. Appellant then filed answers of gen-

eral denial to the cross-complaint. On September 18, 1911, appellees had filed their suit against appellant and her husband for the specific performance of a contract entered into by all the parties wherein it is averred that appellant agreed to furnish \$1,000 and the appellees any necessary remaining sum, all of which was to be used for purchasing a home for appellees on certain conditions which were to be performed by appellees, but when the purchase was concluded, the paper title to the lands so purchased was taken in the name of appellant in violation of her said agreement. The prayer was that the land in controversy be ordered conveyed to appellees by appellant and her husband, or upon their refusal so to do, that a commissioner be appointed to make such conveyance. Summons was not issued in this cause, however, until October 2, 1911. Later appellant and her husband filed answer in general denial to the complaint, and appellant alone filed her cross-complaint in which was averred substantially the facts alleged in her original complaint. An answer of general denial on the part of appellees closed the issues, and by order of the Sullivan Circuit Court both causes were consolidated and were tried by the court, a special finding of facts made, and conclusions of law stated thereon. Judgment was rendered on the conclusions of law in favor of appellees and that appellant execute to appellees a good and sufficient deed of conveyance for the lands in controversy, within thirty days and upon her failure so to do that the commissioner appointed execute the same, and the court further found for Robert S. Tuell and gave judgment against appellees for his costs. Appellant excepted to each conclusion of law separately and severally.

Each of appellant's first three assignments of error challenges the sufficiency of each paragraph of

appellees' complaint, and cross-complaint, and

1. since the material averments in each are the same, they may be considered together. These pleadings are challenged for the first time by a motion in arrest of judgment, and when so questioned they will be sustained if facts are averred therein sufficient to authorize the rendition of a valid judgment thereon. The rule has often been stated substantially as follows: Before the motion in arrest of judgment can prevail, some material averment essential to the cause of action must be entirely omitted from the complaint or cross-complaint, as the case may be. *Alexander v. Alexander* (1894), 140 Ind. 555, 38 N. E. 855; *Coulter v. Bradley* (1903), 30 Ind. App. 421, 66 N. E. 184.

It will be unnecessary to set out the aver-

2. ments of the pleadings assailed, or to discuss them independently, as a consideration of the special finding of facts and conclusions of law, with proper exceptions thereto, will necessarily determine the same questions. *Timmonds v. Taylor* (1911), 48 Ind. App. 531, 96 N. E. 331; *Goodwine v. Cadwallader* (1902), 158 Ind. 202, 205, 61 N. E. 939. Briefly stated, the facts found by the court are as follows: Ida Tuell is the mother of Bessie J. Homann, and in May, 1904, Ida married Robert S. Tuell, and at that time all the parties were living in the state of Illinois. In November, 1904, George W. Homann married said Bessie, and in the latter part of that year Mr. and Mrs. Tuell moved to Sullivan County, Indiana, where they have since resided. Before moving to Indiana, appellant entreated her daughter to move with her and also live in Indiana, and importuned both her daughter and George Homann, her daughter's husband, to dispose of their farm and home in Illinois, and locate near her in Indiana, and promised that on condition

they would leave their home and 40-acre farm and join her in Indiana, she would furnish \$1,000 to be put in land in Sullivan County, Indiana, to be their property, and would have the deed of conveyance made to them. Pursuant to such proposition the Homanns came to Sullivan County, Indiana, and George Homann and Robert S. Tuell, acting on the instructions of appellant, selected a tract of land, and it was then agreed that this land should be purchased for \$1,100, appellant agreeing to pay \$1,000 on the purchase price, and George Homann agreeing to pay the balance. This land is the north half of the southwest quarter of the northwest quarter of section 33, township 6 north, of range 9 west, in Sullivan County, Indiana. After the land was selected, the Homanns returned to Illinois, sold their real estate and part of their personal property, and in February, 1905, moved to Indiana, and took possession of the real estate in suit, at the request of appellant and pursuant to their agreement, and have resided on it ever since, and have made lasting and valuable improvements thereon, including the building of a barn, with the full knowledge and consent of appellant. While the Homanns were in Illinois appellant had paid \$1,100 for the land, \$1,000 furnished by herself, and \$100 by the Homanns, and procured a deed to the same to be made to herself, rather than the Homanns, without their knowledge and consent. When they took possession of the land, appellees understood and believed that the deed of conveyance was made to them as grantees and when they learned that appellant had been named as grantee, they were informed by her and given to understand that the real estate did in fact belong to them, and she allowed and permitted them to make valuable and lasting improvements there-

on, with the full understanding and belief on their part that the said real estate did belong to them. On September 17, 1911, appellant brought suit against George Homann for possession, and before bringing the suit, she repudiated the contract and served notice on him to vacate. The deed to appellant was made on February 5, 1905, and recorded on February 16, 1905. The Homanns learned for the first time in March, 1905, that the title to the land had been taken in the name of appellant, and they knew this when the improvements mentioned were made, and believed when making them that she would eventually convey the land to them, and that the same was to be considered by them as their own as much as if they had the deed therefor. Appellant paid the taxes each year subsequent to the purchase, and George repaid to her the portion paid by her for the year 1906, but failed to repay her for any taxes paid thereafter, on account of the fact that a dispute had arisen between them, and because she refused to give him a receipt for any money paid her to reimburse her. No money except the \$100 as part of the purchase price for the land was ever paid by the Homanns, and none was demanded until the year 1909, when appellant through her attorney demanded rent for the land, to be paid by two-fifths of all the crops grown thereon. In 1910 the Homanns paid her \$10, and about 120 bushels of corn raised on the land, which was about half of the crop of corn raised there the previous year, and in the fall of 1910 Bessie Homann notified appellant that there was \$25 more for her, which she refused to accept, demanding payment of all she claimed for the year, and not a part. In the year 1910 George Homann raised \$208 worth of melons and 360 bushels of corn on the land, and the rental value of the land was \$125 per year during the time

the Homanns occupied it. On May 29, 1910, appellant caused to be given the Homanns a ten-day written notice to pay rent or deliver up possession of the land, a copy of which notice is made a part of the finding. Appellant has never conveyed the land in suit but still holds the deed for the same. Upon the facts found the court stated as its conclusions of law thereon that the law was with the Homanns, that they were the owners of and entitled to the possession of the land, that appellant should execute to them a good and sufficient deed for the lands, or on her failure to do so the commissioner appointed should do so and judgment was rendered on the conclusions, as heretofore stated.

When appellant excepted to the conclusions of law, she thereby admitted that the facts were correctly found, for the purpose of the excep-

3. tion. But, admitting the correctness of this rule, she insists that the court erred in its conclusions of law because the special findings show that at all times appellant was a married woman, and the contract sought to be specifically en-

4. forced was in parol and therefore the court could not compel its performance. She insists her position is correct on the authority of *Percifield v. Black* (1892), 132 Ind. 384, 31 N. E. 955. In that case the complaint showed that the contract for the sale of the wife's lands was not in writing but parol and executory, and it was then very properly held that under our statutes such a contract could not be enforced. But the facts of that case are clearly distinguished from the present. In the case at bar the theory seems to be and the findings of the court show that the agreement relied on did not relate to the conveyance of real estate owned by appellant at the time of the agreement, but related to the furnishing of money which

with the amount furnished by appellees was to be used for the purchase of lands for appellees, that such agreement was based on a promise of full payment and compliance therewith, in that they had disposed of their property and business in Illinois, and had removed to Indiana at the request of appellant, and that they had performed fully their part of the agreement, and therefore the full consideration for the lands so purchased was in fact paid by appellees, that they were put in possession of the lands by appellant under the contract, and that appellant after such full consideration had been paid by appellees, repudiated the contract. It is declared by statute in this State that a married woman has full control of her personal property, and she may make a contract binding on her with reference thereto, the same as a *feme sole*. §7853 Burns 1914, §5117 R. S. 1881. So that as the \$1,000 which it was agreed would become a part of the purchase price for land for appellees was the property of appellant, she had full control over it and had a perfect legal right to use it for such purpose, and when it was so used in compliance with her agreement which induced appellees to move to Indiana, the equitable title to the lands partly purchased therewith has been in appellees from the time the deed of conveyance was made to appellant, and equity will interpose for the purpose of placing the record title in them as against appellant, whose duty it was in the first instance, upon all the facts of the case, to have had the deed executed in their names.

Under the facts of this case, appellant can not insist upon the application of the general rule that a tenant is estopped while in possession of the  
5. lands to deny the landlord's title. The findings clearly show that appellees entered into



possession of the land under claim of ownership, and upon the belief that the title was in them, and did not discover that the deed of conveyance had not been executed to them until after possession had been taken. By the filing of her suit against appellees to quiet her title to the land appellant was the one who put the title in issue, and as is said in the case of *Stevenson v. Rogers* (1910), 103 Tex. 169, 125 S. W. 1, Ann. Cas. 1912D 99, 29 L. R. A. (N. S.) 85, "When, however, as in this case, the suit is to recover possession and to establish the title of the plaintiffs, whereby the title of the tenant would be destroyed, the latter may defend by showing a superior title in himself. \* \* \* when it is the purpose of the suit \* \* \* to establish title \* \* \* , where the decree sought would not only give possession of the land but by estoppel settle the title to it, the rule does not apply." See, also, *Jochen v. Tibbells* (1883), 50 Mich. 33, 14 N. W. 690; *McKie v. Anderson* (1890), 78 Tex. 207, 14 S. W. 576; *Hebden v. Bina* (1908), 17 N. Dak. 235, 116 N. W. 85, 138 Am. St. 700; *Hamill v. Jalonick* (1895), 3 Okl. 223, 41 Pac. 139; *Croacher v. Oesting* (1887), 143 Mass. 195, 9 N. E. 532; *Van Winkle v. Hinckle* (1863), 21 Cal. 342.

The court did not err in refusing appellant a new trial as of right. It has been held repeatedly that a new trial is not demandable in an action for  
6. specific performance. *Schlichter v. Taylor* (1903), 31 Ind. App. 164, 67 N. E. 556; *Fralich v. Moore* (1890), 123 Ind. 75, 24 N. E. 232; 29 Cyc 1036. Also, if two causes are tried in the same case, in one of which a new trial as of right may be granted, and in the other a new trial as of right is not demandable, a new trial as of right will be denied. *Nesbit v. English* (1915), 58 Ind. App. 10, 107 N. E. 552; *Wilson v. Brookshire* (1891), 126

Ind. 497, 25 N. E. 131, 9 L. R. A. 792; *Nutter v. Hendricks* (1898), 150 Ind. 605, 50 N. E. 748.

The rulings of the court on the admission of certain evidence are complained of, but in view of the position taken by us as to the theory on which the case was tried, we think such rulings were not prejudicial to appellant.

We are satisfied that the merits of the cause have been fairly tried and determined, and a correct conclusion reached. Judgment affirmed.

NOTE.—Reported in 108 N. E. 596. As to estoppel of tenant, see 89 Am. St. 64. For a discussion of estoppel of a tenant in possession prior to the lease to deny the landlord's title, see Ann. Cas. 1913 A 1069. See, also, under (1) 23 Cyc 827, 31 Cyc 82; (3) 38 Cyc 1992; (4) 20 Cyc 238; 21 Cyc 1172; (5) 24 Cyc 937.

### VANDALIA RAILROAD COMPANY v. DARBY.

[No. 8,582. Filed May 7, 1915. Rehearing denied November 5, 1915. Transfer denied December 15, 1915.]

1. CARRIERS.—*Carriage of Passengers.—Traveler on Freight Train.*—Where a woman, at the request of the conductor, entered the caboose of a freight train to accompany and care for an injured person who was being transported to a hospital, she became a passenger to whom the railroad company owed the duty of exercising the highest practical care and diligence in the operation of the train, regardless of the question of the conductor's authority under ordinary conditions to carry passengers on his train. p. 297.
2. CARRIERS.—*Carriage of Passengers.—Injuries.—Pleading.*—A complaint showing that plaintiff was a passenger on defendant's freight train and alleging that while riding thereon the defendant suddenly, without warning, negligently and with great force and violence applied the air brakes while the train was running at a rapid rate of speed, thereby causing the train to stop suddenly and violently, whereby plaintiff was thrown from her chair and injured, sufficiently alleged facts constituting negligence. p. 298.
3. CARRIERS.—*Carriage of Passengers.—Care Required.—Passengers on Freight Train.*—A railway company carrying passengers on freight trains must exercise the highest degree of care for their safety, consistent with the usual and practical operation of such trains, and is responsible for any negligence which results in injury to a passenger while being so carried. p. 299.

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4. **CARRIERS.—Carriage of Passengers.—Passengers on Freight Train.—Presumptions.—Assumption of Risk.**—The presumptions indulged in favor of passengers upon a regular passenger train arise also in favor of a passenger upon a freight train who is injured while passively submitting to the regulations of the company, but one who voluntarily becomes a passenger on a freight train assumes the risks and inconveniences necessarily and reasonably incident to such means of transportation, including the ordinary sudden bumping and jerking of cars in stopping and starting. p. 299.
5. **CARRIERS.—Passengers on Freight Train.—Injuries.—Res Ipsa Loquitur.**—The doctrine of *res ipsa loquitur* applies to a passenger injured while riding on a freight train the same as when riding on a passenger train, but such passenger assumes the risks and inconveniences necessarily and reasonably incident to such transportation. p. 300.
6. **CARRIERS.—Passengers on Freight Train.—Injuries.—Instructions.**—In an action for injuries to a passenger while riding on a freight train, where the evidence showed that plaintiff went upon such train at the invitation of the conductor for the purpose of attending and caring for a person who was being transported to a hospital, an instruction that if plaintiff was injured by reason of the negligence of defendant as charged in her complaint, while rightfully upon the train, without any fault on her part, a finding for plaintiff would be authorized, was not objectionable as authorizing a finding against defendant without showing the relation of passenger and carrier. p. 301.

From Clay Circuit Court; *John M. Rawley*, Judge.

Action by Martha Darby against the Vandalia Railroad Company. From a judgment for plaintiff the defendant appeals. *Affirmed.*

*McNutt, Wallace & Sanders, A. W. Knight and John G. Williams*, for appellant.

*G. S. Payne, Duvall & Beall and Thomas Nance*, for appellee.

**FELT, J.**—Appellee recovered a judgment against appellant for \$750 for personal injuries alleged to have been received by her through appellant's negligence while she was a passenger riding in the caboose of one of appellant's freight trains.

The errors assigned and relied on for reversal of

the judgment are (1) the overruling of the demurrer to the complaint for insufficiency of the facts alleged to state a cause of action and (2) the overruling of the motion for a new trial.

In substance it is charged in the complaint that appellant is a common carrier and on October 11, 1910, was engaged in the business of carrying both freight and passengers from the city of Terre Haute to Indianapolis, Indiana; that at Chamberlain Crossing one of appellant's trains collided with a farm wagon and severely injured a man and woman; that appellee resided near the place of collision and went to the relief of the injured; that appellant placed the injured persons in the caboose of a freight train to transport them to the city of Terre Haute and place them in a hospital; that Mrs. Caveny, the injured woman, was crushed, bruised and unconscious, and at the request and solicitation of the conductor of the train appellee entered the caboose to care for Mrs. Caveny until she reached the hospital; that the conductor promised to give her transportation to Terre Haute and return home if she would do so and she agreed to comply with the request and entered the caboose and cared for the injured lady continuously until the train reached Terre Haute; that Mrs. Caveny was on a cot and appellee sat beside her on a chair furnished her by appellant; that by reason of the aforesaid facts appellee was a passenger on appellant's said train and it was appellant's duty to use the highest degree of care to avoid injuring her; that appellant failed to perform such duty and when the train was approaching the city of Terre Haute, "negligently and carelessly, suddenly and without warning and with great force and violence applied the air brakes to said train, while said train was running at a rapid rate of speed, thereby causing said train to come to a

sudden and violent stop” by reason of which she was suddenly hurled from her seat and violently thrown forward in the caboose fifteen or twenty feet against the side of the car and on the floor and severely injured. Appellant’s memorandum states reasons why the complaint is insufficient as follows: It fails to show (1) that the relation of carrier and passenger existed; (2) that the conductor in charge of the train in question had any authority to permit appellee to board and remain upon the train; (3) that the application of the air brakes was the proximate cause of the injury; (4) the facts which indicate negligence in the use of the air brakes; (5) the complaint does not show that the train was operated in an improper or unusual manner; (6) the complaint shows appellee guilty of contributory negligence; and (7) that she assumed the risk of riding on the freight train.

The allegations of the complaint show that appellant’s conductor in charge of the freight train on which the injured people were placed to be

1. taken to a hospital at Terre Haute, requested appellee to accompany them and care for the injured lady; that in pursuance of such request she entered the caboose, sat by the woman and gave her constant attention until the train was suddenly and violently stopped and appellee was thereby thrown from her chair and injured. Independent of the authority or lack of authority of such conductor under the ordinary conditions of operation to take passengers on such train, in the emergency and under the conditions shown by the complaint, when appellee entered the caboose and rode on the train, for the purpose of that trip the relation of carrier and passenger existed, and it became and was the duty of appellant to exercise the highest practical care and diligence in the operation of such train to avoid

injuring appellee and the other persons transported thereon in the caboose as alleged. *Evansville, etc., R. Co. v. Athon* (1892), 6 Ind. App. 295, 33 N. E. 469, 51 Am. St. 303; *Louisville, etc., R. Co. v. Crunk* (1889), 119 Ind. 542, 21 N. E. 31, 12 Am. St. 443; *Pittsburgh, etc., R. Co. v. Gray* (1902), 28 Ind. App. 588, 591, 64 N. E. 39; 4 Elliott, Railroads §§1579, 1580, 1581; *Indiana Union Traction Co. v. McKinney* (1906), 39 Ind. App. 86, 90, 78 N. E. 203; *Ohio, etc., R. Co. v. Craucher* (1892), 132 Ind. 275, 31 N. E. 941. The allegations

which show that appellant negligently, suddenly and without any warning and with great force and violence, applied the air brakes while the train was running at a rapid rate of speed, thereby causing the train to come to a sudden and violent stop, are sufficient notwithstanding appellee was a passenger on a freight train, for the averments show a negligent and unusual stopping of the train while appellee was riding thereon at the place, in the manner, and under the conditions provided by appellant. The objections to the complaint are not well taken and it is sufficient to withstand the demurrer for insufficiency of the facts alleged. *Indianapolis Southern R. Co. v. Tucker* (1912) 51 Ind. App. 480, 486, 98 N. E. 431, and cases cited; *Louisville, etc., R. Co. v. Bisch* (1889) 120 Ind. 549, 22 N. E. 662; *Domestic Block Coal Co. v. DeArmey* (1913), 179 Ind. 592, 100 N. E. 675, 102 N. E. 99.

Under the motion for a new trial appellant contends that the court committed reversible error in the giving of certain instructions to the jury. It is urged that instructions Nos. 7, 9 and 17 given by the court at the request of appellee are erroneous in applying the rule of *res ipsa loquitur*, by stating in effect that if appellee was a passenger on appel-

lant's freight train and was injured while passively submitting to the regulations of the company by reason of the sudden stopping of the train, the mere happening of the accident, if proven, is at least *prima facie* evidence of negligence on the part of appellant, and casts upon the railroad company the burden of producing evidence that will excuse or overcome such *prima facie* failure of duty and in case the facts are so found from the evidence to prove that the accident could not have been avoided by the exercise of the highest practical care and diligence. It is contended that these instructions authorized the jury to presume actionable negligence on the part of appellant from the mere happening of the accident while appellee was riding on its train, notwithstanding the accident may have occurred while the train was being operated with the highest practical care and diligence, and may have resulted wholly from the usual and necessary jarring and jerking of such trains when properly and carefully operated. It is established law in In-

diana, that when a railway company un-

3. dertakes to carry passengers on freight trains it is required to exercise the highest degree of care for their safety, consistent with the usual and practical operation of such trains, and is responsible for any negligence which results in an injury to a passenger while being so carried. The same

4. presumptions arise in favor of the passenger when so injured on a freight train while passively submitting to the regulations of the company, as in the case of a passenger on a regular passenger train. However, a person who becomes a passenger on a freight train, assumes the risks and inconveniences necessarily and reasonably incident to such means of transportation, when he voluntarily chooses the same, among which risks so assumed are such



sudden bumping and jerking of cars in stopping and starting, as are ordinarily and usually incident to the proper and practical operation of freight trains. *Evansville, etc., R. Co. v. Mills* (1906), 37 Ind. App. 598, 604, 77 N. E. 608; *Indianapolis Southern R. Co. v. Tucker, supra*; *Lake Shore, etc., R. Co. v. Teeters* (1906), 166 Ind. 335, 345, 77 N. E. 599, 5 L. R. A. (N. S.) 425; *Pittsburgh, etc., R. Co. v. Higgs* (1906), 165 Ind. 694, 707, 76 N. E. 299, 4 L. R. A. (N. S.) 1081; *Indianapolis, St. R. Co. v. Schmidt* (1904), 163 Ind. 360, 369, 71 N. E. 201; *Indiana Union Traction Co. v. Maher* (1911), 176 Ind. 289, 294, 95 N. E. 1012, Ann. Cas. 1914 A 994.

Under the foregoing authorities the doctrine

5. of *res ipsa loquitur*, applies to a passenger injured while riding on a freight train the same as when riding on a passenger train. But the passenger assumes the risks and inconveniences necessarily and reasonably incident to such transportation, when the train is properly operated and in overcoming the *prima facie* case made by proof of the accident and injury to the passenger, as alleged, the company has the benefit of the risks so assumed and can not be held liable for any injury which results from the operation of the train, if it is operated with the highest degree of care and diligence consistent with the usual and practical operation of such freight trains. This proposition was clearly expressed in instruction No. 13 given at appellee's request and in instruction No. 40 given at the request of appellant. The instructions complained of are not open to the objections urged against them and are substantially accurate statements of the law applicable to the case on trial. Furthermore, some of the instructions given the jury at appellant's request were more favorable to appellant than the law warrants for they, in effect, deprived ap-

pellee of any benefit of the *prima facie* case made by proof of the accident and injury alleged in her complaint.

Instruction No. 17 is further criticised for the alleged reason that to defeat appellee's recovery it required appellant to do more than show by the evidence that appellee had failed to make out her case by a fair preponderance of evidence, including the presumption of negligence against appellant on proof of the happening of the accident as alleged in the complaint. The instruction is not fairly subject to such interpretation, though the language in one phrase of the instruction is not the most apt to convey the meaning which is clearly expressed by the instruction considered as an entirety. Nor is the objection tenable that it gave the jury an erroneous idea of the burden of proof. *Cleveland, etc., R. Co. v. Hadley* (1908), 170 Ind. 204, 210, 82 N. E. 1025, 84 N. E. 14, 16 Ann. Cas. 1, 16 L. R. A. (N. S.) 527; *Indianapolis St. R. Co. v. Schmidt, supra*.

Instruction No. 8, is criticised on the ground that it authorized a finding against appellant without showing that the relation of passenger and  
6. carrier existed at the time of the accident; that an invitation by the conductor, or other employe, was sufficient to show that appellee was a passenger. The instruction refers to the circumstances under which appellee entered the caboose and informed the jury that if it found appellee was injured by reason of the negligence of appellant as charged in the complaint, while rightfully upon the train, without any fault on her part, it was in such event authorized to find for the plaintiff. There was evidence tending to prove that the conductor of the freight train called up the train dispatcher and got orders to bring the injured people to the hospital at Terre Haute and that in so doing

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he secured appellee to care for the injured lady and placed appellee in the caboose and she sat on a chair furnished her by the conductor, and gave constant attention to the injured lady, and was attending to such duties when injured. The instruction is not objectionable for the reasons alleged, nor is it subject to the further criticism urged against it and other instructions, that they permitted the jury to go outside the issues.

The other questions discussed are in effect disposed of by what we have said and by the decisions cited. The case seems to have been fairly tried on the merits and no intervening errors are shown which are prejudicial to appellant. Judgment affirmed.

NOTE.—Reported in 108 N. E. 778. As to *res ipsa loquitur* doctrine, see 113 Am. St. 999. As to liability for injuries to passengers inside the car from sudden starting or stopping of train, see 34 L. R. A. (N. S.) 229. On presumption of negligence from injury to passenger, see 15 L. R. A. 33; 13 L. R. A. (N. S.) 601; 29 L. R. A. (N. S.) 808. As to who is a passenger of a carrier, see 1 Ann. Cas. 451. See, also, under (1) 6 Cyc 540, 544; (2) 6 Cyc 626; (3) 6 Cyc 591; (4) 6 Cyc 652; (5) 6 Cyc 628.

## BUCKEYE WINDOW GLASS COMPANY v. STEWART-CAREY GLASS COMPANY.

[No. 8,534. Filed December 15, 1915.]

1. APPEAL.—*Briefs.*—*Waiver of Error.*—An alleged error must be regarded as waived where appellant's brief contains no proposition or point directed thereto. p. 309.
2. APPEAL.—*Questions Presented.*—*Ruling on Demurrer.*—*Briefs.*—No question is presented by an assignment of error in overruling a demurrer, where neither the pleading, to which the demurrer was addressed, nor its substance is set out in appellant's brief. p. 310.
3. APPEAL.—*Assignment of Errors.*—*Transcript.*—*Failure to Comply With Rules.*—Where, in the preparation of the transcript, appellant has not complied with that part of Rule 3, specifying that where the evidence is set out, the name of each witness and whether the examination is direct, cross or redirect shall be stated in the

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margin of every page, the court must disregard the assignment of error in the overruling of the motion for a new trial in so far as questions arising on the evidence are concerned. p. 310.

4. **APPEAL.—Invited Error.—Admission of Evidence.**—Nothing is presented by the alleged erroneous admission of evidence, where the record shows that the objectionable evidence was introduced by appellant rather than by appellee. p. 310.
5. **APPEAL.—Assignment of Errors.—Waiver.**—An assignment of error not discussed by appellant is waived. p. 310.
6. **SALES.—Action for Price.—Evidence.**—In an action for the price of a carload of window glass sold to defendant through plaintiff's selling agent, a letter written by such agent to defendant acknowledging receipt of a copy of specifications forwarded by defendant the day before, together with a prior telegram from the selling agent's representative to defendant, to the effect that the selling agent accepted defendant's order for two cars of window glass, and that plaintiff's president would call, were properly admitted in evidence, since the telegram was an essential part of the contract, and the letter was a step in the consummation of the arrangements made. p. 311.
7. **SALES.—Contracts.—Stipulations as to Time.—Waiver.—Estoppel.**—Where plaintiff accepted defendant's order for two cars of window glass on the stipulation that shipments should be made in October, and shipped one car on October 29, which defendant accepted and paid for on November 10, and defendant, on October 31, notified plaintiff that it would not accept shipments made after that date, defendant's acceptance of the first shipment, though subsequent to the time when second shipment was sent forward, was not a waiver of any of defendant's rights and did not estop it from insisting that time was of the essence of the contract. p. 313.

From Superior Court of Marion County (82,300);  
*Charles J. Orbison*, Judge.

Action by the Buckeye Window Glass Company against the Stewart-Carey Glass Company. From a judgment for defendant, the plaintiff appeals.  
*Affirmed.*

*Guilford A. Deitch, John M. Sheets and Frank G. West*, for appellant.

*Ovid B. Jameson and Linn D. Hay*, for appellee.

CALDWELL, J.—Appellant, an Ohio corporation, doing business at Columbus, Ohio, commenced this action against appellee, an Indiana corporation do-

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ing business at Indianapolis, to recover a balance alleged to be due on a contract by which the former sold to the latter, two carloads of window glass for future delivery. The complaint is in three paragraphs, designated as first, third and fourth. The first paragraph is a common count for goods consisting of one carload of window glass sold and delivered. The third paragraph is on the theory that the contract consisted of an order and an acceptance each in writing, and in the form of letters set out in the paragraph. These letters alleged to have been written, mailed and received by the respective parties are as follows:

“Indianapolis, Ind., October 3, 1910.  
Buckeye Window Glass Co., Columbus, Ohio.  
Gentlemen: We enclose specifications for two cars window glass, which we are sending you as per instructions of the Innes-Weld Glass Company of Chicago. If you will notice, there is 100 boxes 16x24 D. S. A. on this list, and we would thank you to forward these 100 boxes without fail in the first car, as we are in need of same, as we have an order for same. Kindly give this order your prompt attention, and oblige. Yours truly, Stewart-Carey Glass Company.

Columbus, Ohio, October 5, 1910.  
Stewart-Carey Glass Company, Indianapolis, Ind. Gentlemen: We are in receipt of your specifications for 1,112 boxes of glass through our selling agents, The Innes-Weld Glass Company of Chicago. We thank you for the order, and beg to assure you that the same shall have our careful attention, and shipment subject to unavoidable delay. Very respectfully, The Buckeye Window Glass Company.”

It is further alleged that appellee agreed to pay appellant the market value of the glass in the sum of

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\$4,349; that on October 28, 1910, appellant delivered one carload of glass to a railroad company at Columbus, which carload was shipped to appellee October 29, and received, accepted and paid for by appellee in the sum of \$2,391.74; that on November 1, appellant delivered to the railroad company at Columbus for shipment to appellee the remaining carload, which was of the value of \$1,957.26 but that appellee refused to receive or pay for same the agreed sum of \$1,957.26. A copy of the specifications which appellee enclosed to appellant in the letter dated October 3, is made a part of this paragraph. The specifications show only the number of boxes, sizes and quality of glass.

Appellee filed to the first paragraph of complaint an answer in three paragraphs: the first, a general denial; the second, the statute of frauds, concerning the sale of goods, wares and merchandise; and the third, to the effect that the contract was entered into September 29, 1910, and specified that the glass was to be delivered in October; that appellant failed to deliver the glass as agreed, and for that reason, appellee, pursuant to notice to appellant, cancelled the contract October 31. To the third paragraph of complaint appellee also filed an answer in three paragraphs: the first, a general denial; the second, the statute of frauds, and that appellees accepted and paid for one carload of glass shipped to it as agreed, but notified appellant that it would not accept and did not accept goods shipped after October; the third paragraph alleges that the Innes-Weld company acted for appellant as agent in making the contract. In other respects this paragraph is similar to the third paragraph of answer to the first paragraph of complaint. A demurrer having been sustained to the second paragraph of answer to the

third paragraph of complaint, and overruled to the third, and replies filed, appellant thereafter filed a fourth paragraph of complaint. We copy from appellant's brief its interpretation of the paragraph as follows: "The fourth paragraph of complaint is predicated on the theory that even though the contract were for the delivery of the glass in the month of October, the appellee had accepted that part of said glass shipped October 28, knowing at the time of acceptance, and at the time of making payment for the same that the balance of said glass had not been shipped in the month of October, and had thereby waived the requirements as to time, if time was the essence of the contract, and estopped itself to refuse the balance of the order and to deny its liability to pay for same." The fourth paragraph of complaint becomes important primarily in determining the sufficiency of the second paragraph of answer filed to it. The paragraph, as interpreted by appellant, apparently concedes as a matter of pleading that appellant obligated itself to deliver the glass in October, and that time is of the essence of the contract, but that under certain facts pleaded, appellee "waived the requirements as to time", and estopped itself from refusing to accept glass shipped after October. Supplementing appellant's brief from the record, additional facts are alleged in said paragraph of complaint, to the following effect: That the first carload was delivered to the railroad company October 28, shipped October 29, accepted November 4, and paid for November 10; that the second carload was delivered to the railroad company November 1, and that at the time when appellant accepted and paid for the first carload as alleged, it knew that the second carload had been shipped November 1, and that it was on the siding at Indianapolis when said first carload was



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accepted and paid for as aforesaid. These are the facts alleged to constitute the waiver and estoppel pleaded.

To the fourth paragraph of complaint, appellee filed an answer in two paragraphs, the first being a general denial. The second paragraph is lengthy, its substance being as follows: That in the latter part of September, 1910, the price of window glass was abnormally high, with a downward tendency; that by reason of certain pending litigation under the Sherman anti-trust law, glass men expected a sharp decline about November 1; that September 28, H. W. Weld, representing the Innes-Weld Glass Company of Chicago, selling agents for appellant, called on appellee to sell glass; that appellee verbally made to Weld an offer for window glass in quantities and on terms contained in a telegram hereinafter set out; that these terms were not in harmony with the authority of the Innes-Weld Glass Company, as such agents, whereupon it was agreed that Weld should call on appellant, submit the offer and report, and if the offer should be accepted, that appellee should mail specifications to appellant, and a copy to the Innes-Weld Glass Company; that appellant accepted appellee's proposition, and by the former's direction, Weld sent to appellee the following telegram, signifying such acceptance:

"Columbus, O., Sept. 29, '10. Stewart-Carey Glass Co., Indianapolis, Ind. We accept your order two cars window glass 80 per cent double discount 89 and 5 single 90 double, Columbus, new glass prompt shipment next month, Buckeye glass. Mr. Bartram, president, will call. Please favor him with order and confirm to Chicago. H. W. Weld."

It is alleged that the contract between the parties

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as understood by both of them consisted of the verbal offer and acceptance by telegram and not otherwise. The paragraph contains various averments explanatory of the terms used in the telegram, among them that the words "prompt shipment next month" mean and were understood by the parties to mean that the glass should be shipped promptly in October. It was alleged that pursuant to appellee's agreement and a general custom understood by the parties and all glass manufacturers and dealers, appellee forwarded to appellant by mail dated October 3, specifications of sizes and quantities of glass in harmony with the telegram. A copy of such specifications was sent to the Innes-Weld Glass Company as agent. A general custom known to the parties is pleaded to the effect that when an order for more than one carload of glass is given, the carloads, for reasons set out, are shipped, invoiced, accepted, discounted and paid for separately and as a single complete and independent order; that pursuant to said custom referred to in appellee's letter of October 3, thereby and in other ways alleged to have been recognized by appellant, it manufactured, loaded and shipped one carload promptly in October as agreed, which carload was invoiced, discounted, accepted and paid for separately, but failed to ship the other until November 1, about which time the price of glass declined 33 1-3% as was anticipated when shipment in October was specified. Other allegations of this paragraph of answer bearing directly on the issue of waiver and estoppel tendered by the fourth paragraph of complaint are as follows: "That on the last day of October, 1910, and before plaintiff had shipped the said last carload of window glass, defendant notified plaintiff that it would not receive or accept the window glass shipped and delivered after October 31, 1910, as such shipment

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would not be in accordance with the contract; that notwithstanding said notice and notwithstanding the fact that delivery was not in accordance with the contract to deliver in October, 1910, plaintiff loaded and shipped said carload of glass and consigned to defendant, which defendant refused to accept; that said carload of window glass accepted by defendant was delivered within the time required in the contract, and accepted by defendant after the time had expired for delivering any more glass under the terms of the contract, and after notice had been given not to deliver same after October 31; that by the neglect of plaintiff to ship said carload of window glass within the month of October, 1910, and in accordance with the terms of the contract of sale, said contract was terminated and defendant was discharged from any obligation to receive, accept or pay for the same."

Appellant's demurrer to the second paragraph of answer to the fourth paragraph of complaint was overruled and the cause put at issue. A trial by the court resulted in a finding, and judgment for costs in favor of appellee. The errors relied on for reversal as set out in appellant's brief, and as numbered by us are in substance as follows: (1) Overruling the demurrer to the third paragraph of answer to the third paragraph of complaint. (2) Overruling the demurrer to the second paragraph of answer to the fourth paragraph of complaint. (3) Sustaining the demurrer to the amended second paragraph of reply to the third paragraph of answer. (4) Overruling the motion for a new trial.

In appellant's brief no proposition or point is directed to the first error relied on, as required by

Rule 22 of this court, and such alleged error

1. must be regarded as waived. *Town of Newpoint v. Cleveland, etc., R. Co.* (1915), 59 Ind.

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App. 147, 107 N. E. 560; *Mutual Life Ins. Co. v. Finkelstein* (1915), 58 Ind. App. 27, 107 N.

E. 557. Neither the pleading referred

2. to in assignment No. 3 above, nor its substance is set out in appellant's brief.

That assignment, therefore, presents no question. *Schultze v. Maley* (1914), 56 Ind. App.

586, 105 N. E. 942. Rule 3 relating to the preparation of transcripts is in part as follows:

3. "Where the evidence is set out by deposition or otherwise, the name of each witness and

whether the examination is direct, cross or re-direct shall be stated in the margin of every page."

The part of the rule stated has been totally disregarded here in the preparation of the transcript.

Appellee by its brief filed more than two years since called attention to such defect in the transcript,

but no steps have been taken to remedy it. Under such circumstances, we are at least required to ignore

the assignment of the insufficiency of the evidence in the motion for a new trial, and other assignments

therein based on the alleged erroneous admission of oral testimony. See, *Roberts v. Wolfe* (1905),

165 Ind. 199, 74 N. E. 990, and cases cited.

The assignment in the motion for a new trial that the court erred in admitting exhibit 17 in

evidence presents no question, for the reason

4. that it appears from the record that appellant rather than appellee introduced that item of

evidence. The remaining assignments in the motion for a new trial are that the decision is contrary

to law, which assignment is not discussed,

5. and therefore waived; and alleged error in admitting in evidence the telegram of September

29, and exhibit 20, which is a letter dated October 4, written by the Innes-Weld Glass Company to

appellee, acknowledging receipt of a copy of the

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specifications forwarded to said company by appellee's letter dated October 3.

In view of appellant's concession that the fourth paragraph of complaint is predicated on the theory of waiver and estoppel, we are not required in 6. determining the sufficiency of the second paragraph of answer filed thereto, to proceed further than to ascertain whether such answer meets the averments of that paragraph of complaint to the effect that appellee waived the element of time in the contract, and is estopped from asserting that there was a breach of the contract in that respect. However, that we may dispose of the remaining assignments in the motion for a new trial, while considering the sufficiency of said paragraph of answer, we broaden our discussion somewhat. Appellant's third paragraph of complaint proceeds on the theory that appellee's letter to appellant dated October 3, and appellant's letter to appellee dated October 5, with the specifications enclosed in the former, constitute the contract between the parties, and that all prior negotiations were merged into these instruments. Appellee, however, bases its pleadings on the theory that the oral offer made September 28, with the telegram dated September 29, constituted the contract; that the telegram closed the contract, and that the subsequent proceedings were but the execution of the details as agreed and understood. Considering the respective contentions, it will be observed that appellee's letter of October 3, does not purport to be an order. Primarily it is to the effect that specifications are enclosed pursuant to some arrangement made with or through the Innes-Weld Glass Company. It contemplates also that there will be two shipments at intervals. An inspection of a copy of the specifications as filed with the third paragraph of complaint discloses that they

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consist of a mere tabulation of sizes, number of boxes of the respective sizes and noting that certain sizes are to be double and others single strength. There is no introductory or concluding direction. It is neither addressed nor signed. Appellant's letter of October 5 also recognizes that whatever arrangements exist have been made through the Innes-Weld Glass Company as appellant's agent. Certain elements usually found in contracts for the purchase and sale of goods are absent from the contract as constituted under appellant's contention. Among them being price, terms, and except for certain general expressions, the element of time of shipment or delivery. Appellant's position is that by the letter of October 3, appellee impliedly agreed to pay the market price. It is significant, however, that its bill of particulars filed with its first paragraph of complaint is in complete harmony with the telegram of September 29, respecting gross price, discount from list, and net price. Appellee, however, contends and alleges that the contract consisted of a specific oral offer made to appellant through its selling agent reported by the latter to appellant, and accepted as evidenced by the telegram of September 29, embodying generally the terms of the oral offer, and sent by direction of appellant. It will be observed that the letters of October 3 and 5 are consistent with appellee's contention in that each recognizes the Innes-Weld Glass Company as a medium. While the telegram is signed only by H. W. Weld, it is alleged that it was sent by direction of appellant and for it. The telegram purports to be a specific acceptance of a prior order. Appellee alone advises us respecting such prior order, and to the effect that it consisted of the proposition made September 28. In said paragraph of answer the telegram is elucidated

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to the effect that by the abbreviated terms used, was meant and understood by the parties to mean that the specifications when prepared should indicate eighty per cent of the order as double strength glass and the remainder as single strength; that the basis of the price should be a list price exhibited to appellee by the Innes-Weld Glass Company, from which there should be a discount of ninety per cent on double strength glass and of eighty-nine per cent and five per cent from the residue, on single strength glass, and that the glass should be shipped promptly by appellant within the month of October. Appellant in causing the telegram to be sent apparently contemplated that its president would call in person, and that the orders should be delivered to him, and that report should be made to the selling agent. There was, however, an immaterial departure in that specifications were forwarded by letter as we have indicated, and a copy to the agent, the receipt of the former being acknowledged by appellant's letter of October 5, and the latter by the agent's letter of October 4. Under such circumstances, it seems to us apparent that the telegram of September 29 was at least a very essential part of the contract, and that the letter of the Innes-Weld Glass Company dated October 4, being exhibit 20, acknowledging receipt of a copy of the specifications was a step in the consummation of the arrangements made, and that the court did not err in admitting either of these instruments in evidence.

Returning to a consideration of the sufficiency of the second paragraph of answer to the fourth paragraph of complaint, facts are alleged in that

7. paragraph to the effect that by the terms of the contract both carloads were to be shipped in October; that one carload was so shipped; that



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on October 31, the remaining carload had not been shipped, whereupon on that date, appellee notified appellant that it would not accept shipments made after October, as such shipments would not be in compliance with the contract. Other facts are alleged as we have indicated, bearing on the element of time as an essential element of the contract. In discussing the element of time as of the essence of the contract involving the sale and delivery of goods, the following language is used: "Where the time of the performance is thus fixed, it is, in the language of the law, deemed usually to be 'of the essence of the contract', and, unless waived by the other party, performance at the time stipulated is indispensable. \* \* \* Obviously, therefore, unless the seller can show that he did what was incumbent upon him to do, as that he delivered, shipped or tendered the goods at the time when such performance was due—neither later nor earlier—or that performance at that time was waived by the other party, he is in no situation either to enforce the contract on his own behalf or resist an action against him by the other party." 2 Mechem, Sales §§1138, 1139. See, also, *Ohio Valley Buggy Co. v. Anderson Forging Co.* (1907), 168 Ind. 593, 81 N. E. 574, 11 Ann. Cas. 1045; *Norrington v. Wright* (1885), 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366; *Filley v. Pope* (1885), 115 U. S. 213, 6 Sup. Ct. 19, 29 L. Ed. 372; *Cleveland, etc., Mill Co. v. Rhodes* (1886), 121 U. S. 255, 7 Sup. Ct. 882, 30 L. Ed. 920. It follows both by reason of allegations contained in said paragraph and also by reason of appellant's concession respecting the theory of the paragraph of complaint to which it is filed, that the sufficiency of said paragraph of answer must be determined on the assumption that appellee contracted for shipment in October, and that time is of the essence of the con-

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tract. If that paragraph is sufficient, then on the tendered issue of waiver and estoppel, the court did not err in overruling the demurrer filed to it.

Under the averments of the fourth paragraph of complaint, the facts apparently relied on as evidencing a waiver of the right to shipment in October and an estoppel to deny its obligation to accept the second carload although shipped in November, are that appellee accepted and paid for the first carload after the second carload had been so shipped. But under the allegations of the answer, appellee on October 31, promptly notified appellant that it would not accept shipments made after the close of October, assigning as a reason that such shipments would not be in accordance with the contract. By implication, appellee thereby manifested its intention to accept and pay for the first carload shipped as specified. This notice was not withdrawn. The subsequent act of accepting and paying for the first carload is characterized by the notice. It follows that the act relied on as constituting a waiver was accompanied by notice that it should not have that effect. As to the element of estoppel, it is apparent that appellant's shipping of the second carload was not induced by appellee's conduct in accepting and paying for the first carload, since the former transaction preceded the latter. The second carload was shipped in the face of appellee's declaration that it would not accept it for reasons assigned. Under such circumstances, we fail to see that appellee waived its right to insist that shipment be made as agreed, or that it is estopped from asserting such right. See 40 Cyc 252. As having a bearing here, we quote the following from *McDonald v. Kansas City, etc., Co.* (1906), 149 Fed. 360, 79 C. C. A. 298, 8 L. R. A. (N. S.) 1110: "The decisions in these cases hold that, where the vendor is

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required by an entire contract, as in the case at bar, to make successive deliveries of the articles sold, and the first deliveries fail to comply with the terms of the agreement either in the quality or quantity of the goods or in the times and places of delivery, the vendee by prompt notice of his refusal to further perform upon the discovery of the failure may relieve himself from liability for subsequent deliveries. This, however, is not his only remedy. He has the option, upon the discovery of the seller's default, to refuse to receive and pay for further deliveries, and thus to terminate the contract, or to permit the performance to proceed, and to rely upon his damages for the vendor's breach. But he may not delay his exercise of this choice." See also note to that case, and also the following: *Ohio Valley Buggy Co. v. Anderson Forging Co.*, *supra*; *Norrington v. Wright*, *supra*; *Filley v. Pope*, *supra*; *Cleveland, etc., Mill Co. v. Rhodes*, *supra*; *Providence Coal Co. v. Coxe Bros. & Co.* (1896), 19 R. I. 380, 35 Atl. 210; *Babson v. Robertson* (1888), 34 Fed. 203; *Cahen v. Platt* (1877), 69 N. Y. 348, 25 Am. Rep. 203. Judgment affirmed.

NOTE.—Reported in 110 N. E. 710. As to acceptance of installment of goods purchased as precluding buyer from rejecting later installments, see 20 Ann. Cas. 528. See, also, under (1) 3 Cyc 388; (2) 3 C. J. 1415-1420, 2 Cyc 1014; (3) 3 Cyc 95; (4) 3 Cyc 244; (5) 3 Cyc 388; (6) 35 Cyc 566; (7) 35 Cyc 185, 186.

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Napier Iron Works v. Caldwell, etc., Iron Works—60 Ind. App. 317.

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## NAPIER IRON WORKS v. CALDWELL & DRAKE IRON WORKS.

[No. 8,815. Filed December 15, 1915.]

1. **SALES.—*Failure to Deliver.—Action.—Sufficiency of Complaint.***—Paragraphs of complaint in a seller's action to recover on a contract of sale, from which it affirmatively appeared that no shipments were made by plaintiff during the period of time specified in the contract, and in which no legal excuse for such failure was shown, were insufficient. p. 320.
2. **SALES.—*Failure to Deliver.—Modification of Contract.—Complaint.***—Where the contract for the sale of a large quantity of iron was in writing, and was within the class of contracts which are required to be in writing by §7469 Burns 1914, §4910 R. S. 1881, there could be no subsequent modification thereof by parol; hence in an action by the seller based thereon, paragraphs of complaint on the theory that plaintiff's failure to deliver as provided by the contract was obviated by a subsequent oral agreement were insufficient. p. 320.
3. **SALES.—*Contracts.—Agreement for Extension.—Consideration.***—Where a quantity of iron sold under a written contract to be delivered within a specified period, was not delivered and the title and possession thereof remained in the seller relieved from any of the agreements contained in the contract, an agreement for extension of time of delivery, to be valid and bring the sale within the provisions of the original contract, required a new consideration. p. 322.
4. **SALES.—*Contracts.—Customs and Usages.***—Where a contract of sale is neither ambiguous nor uncertain, and clearly shows the time and manner of shipment, trade usages and customs are not to be considered in its construction. p. 322.
5. **CONTRACTS.—*Oral Modification.—Fraud.***—A person can not rely upon a mere verbal change of a written contract, and where there is no right to rely on such verbal modification there can be no fraud. p. 322.
6. **SALES.—*Breach of Contract.—Resale.—Notice.***—A complaint for damages for the purchaser's breach of a contract of sale, grounded upon the theory of resale after the purchaser's refusal to accept, must aver notice to the purchaser of the intention to resell. p. 322.

From Bartholomew Circuit Court; *Hugh Wickens*, Judge.

Action by the Napier Iron Works against the Caldwell & Drake Iron Works. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

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*John Rynerson*, for appellant.

*Kohlmeyer & Sharpnack*, for appellee.

IBACH, C. J.—Appellant contends that the trial court erred in sustaining appellee's separate demurrer to each paragraph of appellant's complaint.

On October 16, 1909, appellant and appellee entered into a written contract for the sale of one hundred tons of pig iron, to be delivered to appellee at Columbus, Indiana, during the first half of the year 1910. The contract forms the basis of each of the nine paragraphs of complaint and is in the following words and figures:

"JH No. 7301. Pig Iron Contract. Issued from the office of (Buyer's No.) Rogers, Brown & Company, Furnace Agents. Carew Building, Cincinnati, O., Oct. 16, 1909. Filed by W. Taylor. Sold to Caldwell & Drake Iron Works, Columbus, Indiana. Quantity 100 Tons. Grade standard Southern No. 2 Foundry Iron. This price is based on present tariff freight rate of \$3.65 per ton. In case the tariff rate declines, the buyer is to have the benefit of such decline. In case the tariff freight rate advances the buyer is to pay the advance. Price per ton 2240 lbs. \$18.00 f. o. b. cars, Columbus, Ind. Payment S. D. attached B. L. Freight cash by buyer. If this lot is divided in shipment, settlement shall be made for each shipment as though a separate sale. Failure to make payments when due shall forfeit buyer's right to further deliveries. Shipment. About equally during first half 1910. Subject to possible delay from strikes, accidents, or other causes beyond the reasonable control of the seller. The contract is completely set forth herein. Route, via Big Four. Accepted, Caldwell & Drake Iron Works. (Buyer, J. E. Ferry, Secy.) Please sign here. Napier Iron Works, Per Rogers, Brown & Co., Agts., Per F. W. Miller."

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*Napier Iron Works v. Caldwell, etc., Iron Works*—60 Ind. App. 317.

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The first paragraph of the complaint has to do with the first and only shipment of twenty-five tons of the iron specified which was sent to Columbus, Indiana, and being refused, was resold by appellant to other parties there at a loss, and the theory is that appellant is entitled to recover as its damages the difference between the market price of the iron in the market where resold, and the contract price. The second paragraph is predicated on the theory that under the contract it was appellee's duty to notify appellant and furnish it with specifications and requirements of the shipments of the remaining quantity, but that it failed and refused to do so and for that reason none was shipped and appellant having the iron prepared and on hand ready for shipment, it was entitled to damages for the loss sustained. The third paragraph also deals with the iron which was not delivered and relies upon the same breach of the contract set forth in the second, but proceeds upon the theory that appellant did not have the manufactured iron on hand ready for shipment during the first half of the year 1910, and fixes the measure of damages as the difference between the expense it would have incurred in its manufacture and delivery and the contract price. In the other six paragraphs of the complaint, additional averments are to be found to the effect that the written contract was changed by a subsequent oral agreement as to the time of shipment, that the contract was ambiguous and what trade usages existed under such circumstances should be read into such a contract and made a part of it to arrive at its true meaning. Other matters are averred for the purpose of showing an excuse for not shipping all the iron during the first half of the year 1910, and for failing to give appellee notice before reselling the one shipment made.

Since the several paragraphs of the complaint are based on the written agreement and it affirmatively appears from the averments of the first three

1. paragraphs that no shipments were made during the period of time specified in the contract, and no legal excuse is shown for such failure, it can not be seriously contended that either of these paragraphs of complaint states a cause of action. If appellant did not heed the terms of the contract, surely appellee will not be required to do so.

Appellant by its additional paragraphs of complaint seeks to supply the averments omitted from the original paragraphs by averring in sub-

2. stance that the written contract was modified by a subsequent oral agreement whereby it was agreed that no shipments should be made until a time later than that specified in the writing, and then after notice from appellee. A party to a written contract which falls within the provisions of the statute of frauds will not be heard to say that any of its provisions have been changed by a mere oral agreement and a new contract partly oral and partly written result therefrom. §7469 Burns 1914, §4910 R. S. 1881. The Supreme Court of this State in the case of *Bradley v. Harter* (1901), 156 Ind. 499, 506, 60 N. E. 139, said: "It is true that the consideration for the sale of real estate, even as between the parties to the written contract, may be shown by parol where such consideration is not of itself contractual within the terms or provisions of the written instrument, but when a written contract affected by the statute stipulates, fixes, and provides for the payment of the consideration as was done under the written agreement in this case, the consideration and mode or manner of its payment as therein fixed and provided become a part of the contract, and the latter as to these is no



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more open to change or modification by parol than it is in respect of any other of its parts." To the same effect is *Burgett v. Lock* (1909), 43 Ind. App. 657, 88 N. E. 346, and cases cited. While it is to be conceded that these cases are considering §7462 Burns 1914, §4904 R. S. 1881, which concerns the sale of real estate, yet §7469, *supra*, which deals with the sale of goods greater in value than fifty dollars, also requires that there be a memorandum in writing signed by the party to be charged in order to make a binding contract. Consequently the reasoning adopted in the cases which construe the former statute applies with equal force to the latter. In 29 Am. and Eng. Ency. Law (2d ed.) 824, 825, we find a helpful discussion of the same proposition. Here the writer says, "And it has been said that it is not important whether or not the alteration is in a particular which was originally required by the statute to be in writing. If any alteration is made, so that part of the contract has to be proved by oral evidence, it ceases to be a contract in writing and is thus exposed to all the evils which the statute was intended to remedy. Within the rule the time of performance can not be changed by parol." There are some exceptions to this general rule, but neither of the paragraphs of the complaint before us comes within any of such exceptions. Here we are considering a contract which is by statute required to be in writing, and a time is definitely fixed within which it is to be performed, so that under the facts as disclosed by the pleadings, we are satisfied that the limitation as to time was a part of the contract the same as any other provisions thereof, and could not have been modified in the manner contended for by appellant. *Browne*, Stat. of Frauds §411; *Hanson v. Marsh* (1888), 40 Minn. 1, 40 N. W. 841.

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Upon this branch of the case we are satisfied

3. that as the iron was not delivered to appellee during the first half of the year 1910, the title and possession thereof were both in appellant relieved from any of the agreements contained in the contract, and to again bring it within the provisions of the original contract and extend

4. the time for delivery, such agreement as to extension, under the facts of this case, to be valid would have to be supported by a new consideration. The contract in suit is neither ambiguous nor uncertain. The language used by the parties is sufficiently clear to show the time and manner of the several shipments, consequently trade usages or customs are not to be considered in its construction. *Scott v. Hartley* (1891), 126 Ind. 239, 245, 25 N. E. 826.

Neither do we believe that the present case is such a one as would permit appellant to invoke the doctrine of fraud. The law seems to be

5. well settled that a person can not rely upon a mere verbal change of a written contract and where there is no right to rely on such verbal modification, there can be no fraud. *Clark v. Guest* (1896), 54 Ohio St. 298, 43 N. E. 862; *Abell v. Munson* (1869), 18 Mich. 306, 100 Am. Dec. 165; *Platt v. Butcher* (1896), 112 Cal. 634, 44 Pac. 1060.

The paragraphs of the complaint which have to do with the resale of the iron which appellee refused to accept, fail to aver any notice to

6. appellee of the intention to resell prior to such sale. Such an averment is essential to make a paragraph of complaint sufficient based upon that theory. *Ridgley v. Mooney* (1896), 16 Ind. App. 362, 373, 45 N. E. 348.

For these reasons the trial court did not err in sustaining appellee's demurrers to appellant's sep-

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arate paragraphs of complaint. Judgment affirmed.

NOTE.—Reported in 110 N. E. 714. As to the general principle of parol modification of written contracts, see 56 Am. St. 659. As to supplementing contract for sale of personalty by proof of collateral oral agreement, see Ann. Cas. 1914 A 454. See, also, under (1) 35 Cyc 551; (2) 9 Cyc 599; (3) 9 Cyc 593; (4) 12 Cyc 1091; (5) 9 Cyc 428; (6) 35 Cyc 525.

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### LEMCKE, EXECUTOR v. HENDRICKSON, EXECUTOR.

[No. 8,892. Filed December 15, 1915.]

1. APPEAL.—*Review.—Harmless Error.—Ruling on Demurrer.*—Where the subject-matter of appellant's fourth paragraph of answer included the field covered by the third paragraph, imposed no additional burden on appellant than was imposed by the third paragraph, and all proof admissible under the third paragraph was also admissible under the fourth, there was no error in sustaining a demurrer to such third paragraph. p. 325.
2. CONTRACTS.—*Construction by Parties.*—Where the meaning of a contract is indefinite, obscure or ambiguous, the court will consider, and under certain conditions will adopt the construction and practical interpretation placed thereon by the parties. p. 330.
3. CONTRACTS.—*Construction by Parties.*—An agreement entered into by a tenant in common with his cotenant whereby the latter was induced to join the former in a trade of their common property for other property, in which they were to hold their interests in the ratio of three-fifths and two-fifths respectively, and stipulating that the latter's interest in the net rental proceeds should be not less than \$400 annually, provided the net proceeds equal that amount, does not mean that the latter shall have that amount in any case, to the exclusion of the former, if necessary, so that, the annual net rental proceeds exceeding \$1,000, they share in the entire amount in the ratio of their interests in the property. p. 330.

From Probate Court of Marion County (9,446);  
*Frank B. Ross*, Judge.

Claim by Edwin A. Hendrickson, as executor of the will of Augustus M. DeSouchet, deceased, against the estate of Julius A. Lemcke, deceased. From a judgment for claimant, Ralph A. Lemcke, executor, appeals. *Reversed.*

*Roscoe O. Hawkins and Gaylord R. Hawkins*, for appellant.

*Pickens, Cox & Conder*, for appellee.

MORAN, J.—Appellee, Edwin A. Hendrickson, executor and trustee of the estate of Augustus M. DeSouchet, deceased, recovered a judgment in the Marion Probate Court of Marion County, Indiana, against appellant, Ralph A. Lemcke, executor of the estate of Julius A. Lemcke, deceased, in the sum of \$1,007.77. By this appeal, a review of the judgment is sought. Appellee's right of recovery is based upon a claim, which, on account of the nature of the questions presented, can be best understood by setting the same forth in full, other than the verification.

“Estate of Julius A. Lemcke, deceased, to Edwin A. Hendrickson, Executor and Trustee, Dr., under the will of Augustus M. DeSouchet. To amount due under the following

Contract .....	\$2,000.00
Less credit of .....	700.00
Net amount due.....	<u>\$1,300.00</u>

‘In order to induce Edwin A. Hendrickson, executor and trustee under the will of Augustus M. DeSouchet, to join in exchanging the real estate known as the Pierson Block on Delaware Street, Indianapolis, for the real estate known as the Kothe Flats on Virginia Avenue said city and the ground adjacent thereto Julius A. Lemcke agrees; That for the term of the next five years hereafter, if the said Virginia Avenue property remains unsold the said Hendrickson's interest, as trustee, in the net rental proceeds thereof, shall not be less than four hundred dollars annually. Provided, the net proceeds equal that amount and provided the said Lemcke is permitted to have the management of said real estate.’ Claimant says that the net rental proceeds of said flats have equalled \$400 annually and that deceased and his estate have managed the same, but that the said \$400

annually has not been paid except the above sum of \$700."

In addition to an answer of general denial and a plea of payment, appellee filed two other affirmative pleadings, which he styles his third and fourth paragraphs of answer, but the matters pleaded therein make the same pleadings in set-off as a recovery in the sum of \$448 is sought in each of said paragraphs by appellant as against appellee growing out of a course of dealings involving many business transactions in which both parties were interested. To the pleading styled as appellant's third paragraph of answer a demurrer was sustained, which ruling, together with the overruling of the motion for a new trial constitutes the errors relied on by appellant. Upon the issues being closed, the cause was tried upon an agreed statement of facts.

In the presentation of the error based upon the sufficiency of the pleadings, we shall refer to the same as they are referred to in the record as paragraphs of answer. The fourth paragraph of answer is quite voluminous, disclosing several transactions in which real property owned by the parties in common was exchanged for other real estate; loans negotiated to the amount of several thousand dollars to discharge obligations theretofore incurred against the real estate; rent collected by appellant in the neighborhood of \$16,000, covering a period of over four years, and, by the process resorted to in the casting up of the account between appellant and appellee, a balance is shown by this answer in favor of appellant in the sum of \$448. The third paragraph of answer does not specifically plead

1. the facts in reference to the transactions and negotiations included in the fourth paragraph; however, the subject-matter included in the fourth paragraph includes that field covered by

the third paragraph, and imposes no additional burden upon appellant to that imposed by the third paragraph; and any proof that could have been admitted under the allegations of the third paragraph was admissible under the allegations of the fourth paragraph, therefore no error was committed by the court in sustaining the demurrer to the third paragraph of answer. *Peoples State Bank v. Ruxer* (1906), 38 Ind. App. 420, 78 N. E. 337; *Bivens v. Henderson* (1908), 42 Ind. App. 562, 86 N. E. 526; *City of Valapariso v. Spaeth* (1906), 166 Ind. 14, 76 N. E. 514, 8 Ann. Cas. 1021; *Patrons Mutual Aid Society v. Hall* (1898), 19 Ind. App. 118, 49 N. E. 279; *City of Covington v. Ferguson* (1906), 167 Ind. 42, 78 N. E. 241; *Johnson v. Knudson-Mercer Co.* (1906), 167 Ind. 429, 79 N. E. 367.

Under the error assigned on the overruling of the motion for a new trial, the field covered by appellant's brief is that the decision of the court is not sustained by sufficient evidence, is contrary to law, and the assessment of the amount of recovery is erroneous, being too large. The agreed statement of facts covers many closely typewritten pages of the record; a brief statement of which, including the predominant facts thus found will furnish a basis for a presentation of the questions involved. Prior to January 1, 1906, Julius A. Lemcke and Augustus M. DeSouchet were owners in fee simple, as tenants in common of the Pierson block in the city of Indianapolis, owning an undivided three-fifths and two-fifths respectively. Subsequent to March 3, 1906, DeSouchet died and appellee was appointed executor and trustee of his estate. On the date last mentioned the Pierson block was exchanged for the Kothe flats in the city of Indianapolis and on this date the contract heretofore referred to as a part of the claim, which is the basis of

appellee's cause of action, was entered into. The Pierson block was conveyed to Kothe, subject to a \$35,000 mortgage held by the Marion Trust Company, and the Kothe property passed to Lemcke and Hendrickson subject to a mortgage of \$16,000 held by the Northwestern Mutual Life Insurance Company. In addition to the indebtedness of \$35,000 against the Pierson block, Lemcke and Hendrickson owed Lemcke money advanced in connection with their ownership of the Pierson block in two items of \$300 and \$17,000 respectively, so at the time of the conveyance, the indebtedness of Lemcke and Hendrickson as owners of the Pierson block was \$52,300, with a balance on hand of rental \$109.61. Thus they started into the new investment with a preëxisting indebtedness of \$33,300, consisting of the \$16,000 mortgage on the Kothe flats and the two items of indebtedness of \$300 and \$17,000, aforesaid. On March 7, following the conveyance Hendrickson loaned Lemcke and Hendrickson \$2,454.54 to take care of expenses incident to the exchange of the properties, consisting of a brokerage commission of \$1,500 and a payment to Kothe of the difference in insurance and interest. Shortly thereafter for the purpose of merging the indebtedness into one item, a loan of \$35,120, secured by a mortgage on the Kothe flats, was obtained by Lemcke and Hendrickson from the Marion Trust Company, but after obtaining the loan, it was found insufficient to take care of all the indebtedness connected with this transaction and an additional loan of \$928.58 was obtained from the Fletcher National Bank, which took care of the balance of the outstanding indebtedness, together with \$120 of the principal of the \$35,120 loan held by the Marion Trust Company; so the Kothe flats cost Lemcke and Hendrickson, not including the



equity they parted with in the Pierson block, \$35,928.53, in other words, the basis of their investment in the Kothe flats was the equity they parted with in the Pierson block and \$35,928.53. Lemcke and Hendrickson owned the Kothe flats until June 1, 1909, when Lemcke parted with his undivided interest to one Herman Tuttle; and thereafter Hendrickson and Tuttle owned the Kothe flats as tenants in common until June, 1910, when the same was sold at partition sale and purchased by Hendrickson. During the time that Lemcke and Hendrickson were the owners of the Kothe flats, covering a period of thirty-eight months, Lemcke had charge of all the business connected with the same, and together with the Marion Trust Company disbursed all the funds received from loans made and from rent collected. The receipts of the money obtained from the loans made and rent collected, and the disbursements made by Lemcke in connection with the Marion Trust Company, together with the construction to be placed upon the contract, heretofore referred to as being entered into between Lemcke and Hendrickson at the date of the exchange of the property, becomes material from this point. Covering the period of time that Lemcke and Hendrickson were the owners of the Kothe flats as tenants in common there came into the hands of Lemcke from money borrowed and rent received the total sum of \$56,677.36, being the amount received from all sources and with which Lemcke was chargeable. He disbursed, including operating expenses and \$700 paid to his cotenant, the sum of \$56,747.34, in connection with his duties as manager of the property, thus disbursing \$69.98 more than came into his hands from all sources. The total receipts from rents collected by Lemcke while the relation of tenants in common existed

between Lemcke and Hendrickson, was \$16,435.43. Of this amount \$8,534.95 was disbursed for operating expenses of the property, leaving a balance of rent in the sum of \$7,900.48, of which they would have been entitled to three-fifths and two-fifths respectively, if their relation is not changed by the contract. The balance of the rent \$7,900.48 not used to pay operating expenses, together with money borrowed that came into the hands of Lemcke went to discharge obligations which Lemcke and Hendrickson owed in the ratio of their interests in the Kothe flats.

The contract provides that in order to induce Hendrickson as executor and trustee of the estate of Augustus M. DeSouchet to join in the exchange of the properties, Julius A. Lemcke agreed that Hendrickson's interest in the "net rental proceeds" in the Kothe flats should not be less than \$400 annually for a period of five years thereafter, if the property remained unsold, "provided the net proceeds equal that amount," and Lemcke was permitted to have the management of the real estate. Lemcke had the management of the property as contemplated by the contract, and the "net rental proceeds" exceeded \$400 per annum. Appellee contends that under the contract the "net rental proceeds" having equalled \$400 for each and every year throughout the time the parties were the owners as tenants in common of the Kothe flats, that appellee is entitled to \$400 per annum out of the rent, and that whatever balance remained should go to the respective parties in the ratio of their interest in the property, and it is urged that this construction of the contract is sustained by the conduct of the parties by the payment of \$700 by Lemcke to Hendrickson in six different installments from June 13, 1906, to January 17, 1908.

It is the law that when the meaning of a contract is indefinite, obscure or ambiguous, the construction placed thereon by the parties will be considered by the court in arriving at their intention, and it may become the duty of the court, under certain conditions to adopt the construction and practical interpretation placed on the contract by the parties. *Morris v. Thomas* (1877), 57 Ind. 316; *Gardner v. Caylor* (1899), 24 Ind. App. 521, 56 N. E. 134; *Cal Hirsch & Sons, etc., Co. v. Peru Steel, etc., Co.* (1912), 50 Ind. App. 59, 96 N. E. 807; *Diamond Plate Glass Co. v. Tennell* (1899), 22 Ind. App. 132, 52 N. E. 168; 6 R. C. L. 852, §241; 9 Cyc 590; *Sternbergh v. Brock* (1909), 225 Pa. St. 279, 74 Atl. 166, 133 Am. St. 877, 24 L. R. A. (N. S.) 1078; 2 Page, Contracts §1126; 2 Elliott, Contracts §1542. The rule seems to be clearly stated in *Morris v. Thomas, supra*, 322, as follows: "If there was any obscurity, uncertainty or ambiguity in the terms of this contract, then the acts of the parties in connection therewith, as suggested by appellant's counsel, would furnish valuable aid in the construction of the contract. But where, as in this case, the terms of the contract are plain, intelligible and free from doubt and uncertainty, rules of construction are unnecessary and of no possible service. In such a case, it is certainly not the province of the courts, by any rules of construction, to make another and entirely different contract for the parties from the one they made for themselves."

The rule sought to be invoked by appellee is only applicable when there is obscurity, uncertainty or ambiguity in the terms of the contract. From

3. the large volume of business transacted and the circumstances under which the payments were made by Lemcke to Hendrickson, we can not

say that it would add much to appellee's contention even if the contract fell within that class applicable to the rule contended for; but here the contract seems to be plain and free from doubt and if so, the construction of the parties, if what they did should be regarded as placing a construction on the same, would not be of controlling influence, for as against a contract that is plain, free from doubt and ambiguity, an erroneous construction placed thereon will not be followed. *Diamond Plate Glass Co. v. Tennell*, *supra*, and authorities cited. The manifest inducement held out to Hendrickson by Lemcke to consent to the exchange of the properties was that ultimately there should be paid to him out of the rent received from the Kothe flats not less than \$400 annually, for his share, if it produced so much, even if Lemcke had to forego all of his share of the rent. This seems to be the reasonable construction to place upon the contract, therefore the trial court erred in holding that appellee was entitled to \$400 per annum irrespective of the amount of the rent received over and above the operating expenses. When the "net rental proceeds" reached \$400, Hendrickson was entitled to this amount and Lemcke was no longer personally liable therefor but could apply the rent to this extent to discharge his obligation under the contract, and whenever the "net rental proceeds" reached \$1,000, which it did and more, each year during the time that the relation as tenants in common existed between the parties as to the Kothe flats, and was applied to the obligations, which they owed in the relation as they were entitled to the rent, Hendrickson was not harmed thereby, for by privity of relation existing between them, a payment by Lemcke on obligations that they both owed would be equivalent to a payment to Hendrick-

son to the extent of his share of the rent thus applied. The "net rental proceeds", as we have seen, were \$7,900.48, over and above the operating expenses, and of which appellee was entitled to \$3,160.19 and appellant to \$4,740.29, all of which, together with money that came into appellant's hands from all other sources, and with \$69.98 of his own money, was applied to the discharge of obligations owing from the parties respectively, except the \$700 paid by Lemcke to his cotenant.

In accordance with the construction we have placed upon the contract, appellant was entitled to \$69.98 out of the \$700 paid Hendrickson, and after this deduction, appellant and appellee were entitled to the residue in the ratio that Lemcke and Hendrickson owned the Kothe flats. Judgment reversed with instructions to the lower court to grant a new trial, and for further proceedings consistent with this opinion.

NOTE.—Reported in 110 N. E. 691. See, also, under (1) 31 Cyc 358; (2) 9 Cyc 588

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### VANDALIA RAILWAY COMPANY v. DULING.

[No. 8,606. Filed June 4, 1915. Rehearing denied October 29, 1915. Transfer denied December 16, 1915.]

1. RAILROADS.—*Injury to Trespassing Animals.—Liability.*—At common law it is the owner's duty to keep his animals confined to his own premises, and if, notwithstanding his exercise of reasonable care to prevent it they escape to the right of way of a railroad company they are trespassers thereon, and the railroad company, being without fault respecting their escape, owes the owner no duty of seeing them, and, having no knowledge of their presence, would not be liable for injury or death caused by its train striking them; but where a company has knowledge of the presence on its tracks of animals that have escaped thereon without contributory negligence of their owner, a liability predicated on negligence may arise, dependent on the facts in each case, because of injury or death resulting from the operation of its train, regardless

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of whether the company had properly guarded and fenced its tracks; liability in such case being on the principle that a duty may arise from the knowledge of a situation, the violation of which constitutes negligence. p. 339.

2. **RAILROADS.—Injury to Trespassing Animals.—Reasonable Care.—Jury Questions.**—Where defendant's engineer had information that animals had escaped upon defendant's tracks and that he would probably encounter them, a duty arose to use reasonable care to discover them, and, after their discovery, to avoid injuring them; and the question of whether such care was exercised was one of fact for the jury, in view of the fact that defendant also owed a duty to carry and deliver safely its passengers, and to the public and itself in the preservation of property. p. 346.
3. **APPEAL.—Review.—Presumptions.**—Where the instructions are not before the court on appeal, it will be presumed that the trial court performed its duty in that respect. p. 347.
4. **APPEAL.—Review.—Verdict.—Conclusiveness.**—Where the issue of negligence in the killing of certain animals while the same were trespassing upon defendant's railroad tracks was properly raised, and there was evidence to show knowledge by defendant's engineer of their presence upon the tracks, together with other evidence making the question of negligence properly one of fact for the jury, its verdict for plaintiff was sustained by sufficient evidence. p. 347.
5. **NEGLIGENCE.—Railroads.—Injury to Animals.—Last Clear Chance.**—The doctrine of last clear chance may be applied in cases involving negligent injury to or the killing of animals, and also in cases involving inanimate property. p. 348.
6. **EVIDENCE.—Experiments.—Admissibility.—Similarity of Conditions.**—To render testimony admissible respecting experiments made subsequently to the killing of certain animals by defendant's train, to ascertain the distance at which objects could be seen in the light of the train's headlight, it was not essential that the conditions should have been exactly reproduced in all details, but it was sufficient if the conditions were shown to have been substantially the same as when the animals were killed, and any departure in such matter goes to the weight rather than to the admissibility of the evidence. p. 348.
7. **EVIDENCE.—Experiments.—Similarity of Conditions.—Discretion of Court.**—The determination of whether conditions under which an experiment is made were substantially the same as those existing at the time of the occurrence under investigation, so as to render evidence of such experiments admissible, necessarily requires the exercise of some discretionary power by the trial court. p. 348.

From Owen Circuit Court; *James B. Wilson*,  
Judge.

Action by Henry E. Duling against the Vandalia Railroad Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

*Samuel O. Pickens, Owen Pickens, R. F. Davidson and John G. Williams, for appellant.*

*Willis Hickam and Hubert Hickam, for appellee.*

CALDWELL, J.—Appellant brought this action to recover the value of certain horses and mules alleged to have been run into and killed by one of appellant's passenger trains. It was alleged that the animals escaped from appellee's pasture to appellant's right of way and track without the knowledge of appellee, and that they so escaped and were subsequently killed without any fault or negligence on his part. The complaint declares on a common-law rather than a statutory liability, and proceeds on the theory of negligence. It is alleged in substance that appellant's employes in charge of the train that killed the animals had received prior notice from certain of appellant's employes and officials that the animals were on the right of way and track at or near the point where they were subsequently killed, and that they were warned to be on the lookout for the animals while approaching and running by such point. The negligence charged is to the effect that appellant by its said employes in charge of and operating the train with such knowledge negligently ran the train by such point at the great and unusual speed of thirty-five miles per hour, and negligently failed to keep a lookout for the animals at such point and negligently chased them along the track without slackening speed or ringing the bell or sounding the whistle for a distance of more than 700 feet where the configuration of the track and right of way was such that they could not escape and thereby ran upon and killed them.

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The complaint is not questioned. A trial resulted in a verdict and judgment for appellee in the sum of \$1,175. The questions presented arise under the motion for a new trial. These questions are respecting the sufficiency of the evidence, and alleged errors in admitting evidence. Appellee introduced evidence to the following effect: Appellant's railroad extends westward through Spencer to Vincennes. Rattlesnake station is three miles and Freedom nine miles west of Spencer. White's Point is three miles west of Rattlesnake station. From White's Point the railroad extends westward on an embankment in a straight line for three quarters of a mile through appellee's farm, and there near the west side of the farm enters a cut which is about 250 feet long and five to fifteen feet deep. From White's Point to the cut the railroad is on an ascending grade, increasing gradually from twenty-eight feet to sixty-six feet per mile. The view westward from the point to the cut is open, there being no intervening trees or other obstructions along the right of way. Appellee's private farm crossing is at the west end of the cut leading to which from a field south of the railroad is a gate through the railroad fence. On and prior to Sunday, February 12, 1912, appellee was pasturing horses and mules in said field. At about ten a. m. of that day appellee and wife left home to spend the day with friends a few miles distant. Shortly after leaving home, appellee learned that his horses and mules had escaped to the right of way. He thereupon telephoned to his sons at home, who drove the animals back into the field, and learning that they had escaped through the gate, fastened it by means of a rail propped from the railroad side and a wire ex-

tended around the post and the upright of the gate. By one o'clock p. m., the animals had again escaped to the right of way without the knowledge of appellee, and there was nothing to indicate that appellee was at fault in the matter. In some manner not disclosed by the record, notice was received at the office of appellant's superintendent that the animals were on the right of way, and from that office orders were issued to the crews of several trains passing the place on that afternoon to be on the lookout for them. The animals were killed by a west bound passenger train due at Spencer at about 6:40 p. m., designated as train No. 55. At Spencer appellant's telegraph operator delivered to the conductor and engineer of No. 55 an order signed by appellant's superintendent to the effect that they were to look out for stock on the track near White's Point. The operator testified he knew the conductor saw the order but he was not certain as to the engineer, so he forwarded it to Rattlesnake where it was delivered to the engineer. Train No. 55 passed through appellee's farm about 7:30 p. m. A few moments after it had passed, five of the animals were found dead or so badly injured that they died where they lay, and one was so seriously injured that it died the next day at the barn. All were in the cut, five on the north side and one on the south. The one farthest west was 160 feet from the one farthest east. Those on the north side were struck on the left hip and side, and the one on the south on its right hip and side, thus indicating that all were facing west when struck. There was other evidence indicating that the animals were thrown west by the collision. The gate was open about three feet, ground frozen, some snow and slush. The tracks indicated that the animals

had passed out through the gate, thence eastward along the right of way, and had passed onto the track 660 feet east of where the one lying farthest east was found. From where they entered on the railroad, the tracks of the animals indicated that they ran rapidly to the place where they were killed. After it had struck the animals, the train stopped 396 feet west from where the west animal was found or 556 feet west of the east one. There was some evidence that the train was running twenty-five to thirty miles per hour, and uncontradicted evidence that the bell was not ringing or the whistle sounded. It was dark at the time, somewhat cloudy, but no fog. There was evidence that headlights such as appellant used on its passenger locomotives illuminated the track on a dark night so that the engineer should be able to see stock on the track at a distance of 450 to 500 feet, and that such a train as No. 55 on such a grade, running twenty-five to thirty miles per hour could be stopped within a distance of 180 to 200 feet, without the use of the emergency brake, and within a distance of 120 feet if the emergency brake is used. There was other evidence of an experiment made at a subsequent time on a dark night at the place where these animals were killed, to the effect that a man on the track could be seen at a distance of 600 feet in the light of the headlight of train No. 55. The engineer of No. 55 was the only witness introduced by appellant. He testified to receiving an order at Rattlesnake to look out for stock just west of White's Point; that as he neared the point he shut off the steam and let the engine drift; that he opened the throttle while climbing the grade; that his speed was fifteen miles per hour while passing the point, and not to exceed six miles per hour by the time he

saw the stock; that he was looking out for the stock all the time; that his first knowledge of the presence of the animals was that he saw two lying on the north side of the track and one on the south, and at the same time saw others huddled together on the track eighty feet in front of the train; that he had no knowledge of striking the first three mentioned, and claimed that the east bound train hit them, although he admitted that he reported all of them as killed by his train. When he saw the animals bunched together on the track in front, he put on the emergency brake, but was not able to stop the train before he hit them, but that he did not know whether they were running or standing still when the train struck them; that the night was misty and the light did not show very far.

Appellant does not contend that the animals escaped from appellee's enclosure to the right of way and track by reason of any contributory negligence or want of reasonable care on appellee's part, nor is it contended that appellant was free from negligence in the occurrence in which the animals were killed. In support of the assignment that the verdict is not sustained by sufficient evidence, appellant's argument may be summarized as follows: (1) That under his complaint appellee seeks to enforce a common-law liability, growing out of negligence, and that therefore no statute under which a railroad company is chargeable for injuring stock can be considered. (2) The evidence shows that the animals were trespassers and that therefore appellant is not liable for injury inflicted on them through negligence; that to charge appellant, the killing of the animals must have been wilful.

Appellee in his brief does not take issue with the first proposition of the argument, and therefore for purposes of the present discussion, it may be treat-

ed as conceded. While appellant's attorneys vigorously contend that the second proposition of the argument, applied to the facts of this case, is sound, yet they frankly admit that they have found no decision of either court of appellate jurisdiction of this State that directly supports it. In addition to certain personal injury cases, that lay down the general proposition that a railroad company owes no duty to a trespasser on its track, except to abstain from wilfully injuring him, appellant cites *Pittsburgh, etc., R. Co. v. Stuart* (1880), 71 Ind. 500; *Dennis v. Louisville, etc., R. Co.* (1888), 116 Ind. 42, 18 N. E. 179, 1 L. R. A. 448; and *Vandalia R. Co. v. Clem* (1911), 49 Ind. App. 94, 96 N. E. 789. The discussion in the *Stuart* case, *supra*, is grounded on the common-law rule that it is the duty of the owner of animals to keep them on his own premises, and that he is a wrong-doer if he suffers them to stray upon the lands of another. That rule, subject to certain exceptions not applicable in that case or in the case at bar, is the law in this State. From that rule, the court in the *Stuart* case deduces a conclusion that although the owner of such animals has exercised reasonable care to keep them within his own enclosure, yet if notwithstanding such reasonable care, they escape to the lands of another, they are trespassers thereon. The court then, after quoting from a number of decisions of courts of other states the doctrine claimed to be applicable to the facts of this case to the effect that a defendant may be held liable for only the wilful, rather than the negligent injury of such trespassing animals, finds and declares it to be unnecessary to endorse or approve the statements of law as expressed in such quoted decisions, but says in substance that the law as stated in such decisions seems to be the logical result or sequence of the com-

mon-law rule above mentioned. As stated in the Stuart case, the deduction of such sequence was not necessary to the decision of that case as indicated by the fact that it was reversed on the ground that the evidence failed to establish the negligence charged. The Stuart case is reviewed in *Pittsburgh, etc., R. Co. v. Shaw* (1896), 15 Ind. App. 173, 43 N. E. 957. The question involved in the case at bar was not in the Stuart case—that is, Where stock escape from the owner's enclosure, without any fault or negligence on his part and wander onto the track of a railroad company, and where the company has or is chargeable with knowledge of their presence, is the company liable for negligently killing them in the operation of its trains?

In the Dennis case cited by appellant, a mare which the owner kept in a securely fenced field adjoining the track of the railroad company escaped therefrom, and entered upon the track, at a point where it was securely fenced. She ran down the track in front of an approaching train, and was caught and killed by it at a cattle guard. The decision turns on a special finding from which there was absent the element that the engineer or fireman saw the mare. The court said: "It is to be remembered that the train was rightfully moving along the track of which the appellee was the exclusive owner, that it was fenced as the law requires, and that the mare was wrongfully on it. The employes of appellee were not under a duty to an owner to see animals wandering on a track securely protected, and here we are concerned only with their duty to the owners of wandering animals. Whether the appellee would have been liable had the engineer or fireman seen the mare and taken no measures to stop the train or frighten her from the track, we need not decide, for it does not appear that they saw

the animal. We do not believe that where an animal wrongfully on the track is not seen, a railroad company is liable, although one of its engines strikes and kills it. This is so, for the reason that the company owes no such duty to the owner of domestic animals, and where there is no duty there can be no negligence." In that case the facts found disclose that the mare escaped from a field securely fenced, and that the owner on learning of the escape took prompt steps to reclaim her. In the absence of anything unusual in the disposition or propensities of the mare, the court held that the owner was not guilty of contributory negligence by reason of the escape. Notwithstanding the absence of contributory negligence, however, the mare being on the track where the company had properly constructed fences as required by law, it was held in effect that the mare was a trespasser on the railroad. The track being properly guarded, appellee's employes had no reason to suspect the presence of the mare or other wandering animal, and hence the company through such employes was charged with no duty towards the owner to be on the lookout for any such animal, or to see it, as expressed in the opinion, and as they did not see the mare or have knowledge of her presence, no duty towards the owner respecting such mare existed. The court however expressly states that it does not decide the question of whether, had the mare been seen by such employes, or had knowledge of her presence been otherwise obtained, any duty would have arisen out of the exigencies of the situation a failure to perform which would have been negligence. *Vandalia R. Co. v. Clem, supra*, also cited by appellant, is readily distinguishable from the case at bar. There are also other decisions in this State where the broad general statement is made, sometimes by



way of *dictum*, sometimes in the course of a decision under the special facts, that a railroad company owes no duty towards the owner of a domestic animal wrongfully on the track, except to abstain from wilfully injuring it, but in each of such cases it will be discovered that the special question presented here is not involved. *Toledo, etc., R. Co. v. Milligan* (1876), 52 Ind. 505, however, is closely in point. In that case the evidence disclosed the following facts: Appellee's pasture field adjoined appellant's track which was securely fenced. Appellee's horses escaped from the field through a gate left open by trespassers, the circumstances being such that the court found that appellee was not guilty of contributory negligence. The engineer of an approaching train, with knowledge of the presence of the horses, chased them down the track, increasing the speed of the train rather than diminishing it, until he ran the train against the animals and killed them. The court held the evidence sufficient to charge the company with the negligent killing of the horses. A study of the case will disclose that knowledge on the part of the operator of the train that the horses were on the track is the key to the decision.

*Chicago, etc., R. Co. v. Ramsey* (1907), 168 Ind. 390, 81 N. E. 79, 120 Am. St. 379, while reversed for defects in the special finding, is applicable here also, at least to the extent that the Supreme Court there recognizes the doctrine that even where cattle are wrongfully on a railroad track the duty to exercise care towards them may grow out of the situation, if known, a violation of which will constitute negligence. It appears from the opinion in that case that the second paragraph of complaint, like the complaint here, was based on the alleged negligence of the railroad company's servants in the

management of the train that killed the cattle involved. In addition, we learn from an examination of the transcript in that case that such paragraph alleged in substance that appellee's animals were on the track without negligence on his part; that appellant's servants operating the train knew of the presence of the animals on the track in time to avoid injuring them, by the exercise of due care, and that under such circumstances such servants negligently ran the train into the animals and killed them. Although the complaint states a cause of action at common law rather than under a statute, the court cites §5446 Burns 1914, Acts 1885 p. 148, which provides in substance that where animals have escaped to a railroad track through a gate at a private crossing and are killed or injured by cars or locomotives, the railroad company shall not be liable to pay damages therefor unless it shall be proved that such killing or injury was caused by the negligence of the servants of the company owning or operating the railroad. Although the complaint did not allege that fact, the evidence and the findings both disclose that the animals in fact escaped to the track through a gate at a private crossing. The court, applying to the case the principles of the common law to ascertain the presence or absence of negligence, said: "The railroad company owed the plaintiff no duty to be on the lookout for his cattle. They were wrongfully and unexpectedly on the right of way, while the company was running its train at a speed at a place where it had a right to run it unobstructed by the presence of cattle. If the employes in charge of the locomotive actually saw the steers on the track, and could have stopped the train with reasonable effort and safety, and avoided the injury, whether the failure to do so, under the circumstances, constituted negligence, was a ques-

tion of fact." In that case, it will be observed that the court recognizes as applicable the principle that a duty may arise out of a situation, if known, and that violation of such a duty will be negligence. By way of illustration and with a view to a deduction, we call attention to *Cincinnati, etc., R. Co. v. Hiltzhauer* (1885), 99 Ind. 486, and *Chicago, etc., R. Co. v. Fenn* (1891), 3 Ind. App. 250, 29 N. E. 790, each of which is representative of a class. These cases are similar in that each involves the killing of a domestic animal at a public highway crossing by a railroad train, such animals being on the public highway unattended, and there being no order of the board of commissioners permitting domestic animals to run at large. The negligence charged in each case was the failure to give the statutory signals. In the former case the owner voluntarily permitted the animal to run at large, and it was held that such fact constituted contributory negligence on his part barring a recovery. The court says that railroad companies are not liable for killing cattle upon public highway crossings in cases where the owner wrongfully permits them to run at large, and many authorities are cited. Of course, the language of the court must not be understood as excluding liability for a wilful killing. In the latter case the animals escaped from the owner's enclosure without negligence on his part, and the court held that as to such an animal it was the duty of the railroad company to give the statutory signals, and that the failure to do so was negligence, which if the proximate cause of the injury entitled the owner of the animals to a recovery, although they were not on the highway by strict right. It is evident that in the former case a recovery was denied on the ground that the contributory negligence of the owner of the animal in permitting it to be at

large unattended extended down to the time of the collision, and that such contributory negligence concurred with the negligence of the railroad company in producing the result complained of. But let us assume that under the circumstances otherwise surrounding such a case the servants of the railroad company in operating the train have knowledge of the position of the animal on the crossing, and that it is likely to be killed by the train colliding with it, and that by the exercise of reasonable care consistent with the duty that the company owes the traveling public, and having regard also for the preservation of its own property such a collision may be averted, Does any duty to exercise such care arise out of the situation? Or is it true that by reason of the fact that the animal is on the crossing through the negligent conduct of the owner, the operators of the train, knowing of its presence unattended there and that it is likely to be killed, may nevertheless proceed to that end with no resulting liability unless the act is wilfully done? As indicated, these questions under somewhat similar circumstances are left undecided in *Dennis v. Louisville, etc., R. Co., supra*, but *Toledo, etc., R. Co. v. Milligan, supra*, and *Chicago, etc., R. Co. v. Ramsey, supra*, at least bear very strongly towards answering the former question in the affirmative the latter in the negative. *Hohl v. Chicago, etc., R. Co.* (1895), 61 Minn. 321, 63 N. W. 742, 52 Am. St. 598, is instructive here: That decision is in complete harmony with both the Hiltzhauer and the Fenn cases, but in its discussion extends further than either of those cases. The doctrine of that case, as in the Hiltzhauer case is to the effect that where the common-law rule prevails, if the owner of a domestic animal has not kept it within his enclosure when he might have done so by proper care, he can not recover from the rail-

road company for running over it at a public highway crossing, without first showing some negligence in the management of the train, or the omission of some statutory duty after the animal is discovered; that in such case the animal is unlawfully at large by reason of the fault of the owner, and that therefore the duty of the railroad company to exercise care for its safety does not arise until it is actually discovered.

In the case at bar, there was no direct evidence that appellant's engineer in charge of the train actually saw the animals on or near the track

2. until after three of them had been struck by the train, or that he saw the others in time to avoid contact with them by the exercise of reasonable care after so seeing them. If visual knowledge of the presence of animals on a railroad track is sufficient to call into action the duty to exercise reasonable care under given circumstances, we are unable to see any reason why knowledge obtained in any other manner is not effective to the same end under like circumstances. The evidence here is conclusive that the engineer did have knowledge sufficient to apprise him of the probable presence of the animals on or near the track at a point designated with a fair degree of accuracy. The situation then is not one where animals are unexpectedly encountered on the track. The engineer had creditable information that he probably would encounter them. Under such circumstances, appellant does not contend that the jury was unwarranted in finding from the evidence that appellant by its engineer failed in fact to exercise due care for the safety of the animals by keeping a reasonable lookout for them, and having discovered them by exercising such care to avoid injuring them, and as a consequence that appellant, by its engineer, was negligent in the mat-

ter, but rather appellant contends that if the animals were on the track without right, no legal duty to exercise reasonable care respecting them existed or arose, and therefore, there could be no available negligence. However, we are convinced from an analysis of the decisions referred to herein that appellant is wrong in its contention. Having knowledge of the probable presence of the animals on or near the track, as communicated to him by appellant's superintendent, a duty to maintain a reasonable lookout for the animals arose, although they were wrongfully on the track, and having discovered them, by means of such a lookout, a like duty to exercise reasonable care to avoid injuring them arose. We express no opinion respecting what would be such a reasonable lookout, or what would constitute such reasonable care, or whether as matter of law the duty in these respects was performed. All these matters were questions of fact for the jury to determine from the evidence, in view of the fact that appellant owed a duty also safely to carry and deliver at their destinations the passengers on the train. It owed a duty also to the commercial public and to itself in the preservation of its own property. *Pittsburgh, etc., R. Co. v. Stuart, supra*. All these questions were for the consideration of the

jury under proper instructions from the

3. court. The instructions are not before us, and we shall, therefore assume that the court performed its duty in this respect. It follows that

the issue of negligence was properly in the  
4. case; that the evidence supporting it was properly submitted to the consideration of the jury. It results that the verdict is sustained by the evidence.

It is apparent that we have deduced as applicable here practically what has come to be known as the

doctrine of the last clear chance. That doctrine had its origin in a case involving the negligent killing of a domestic animal. See *Davies v. Mann* (1842), 10 Mees. and Wels. 546. It is in effect recognized in such cases. *Indianapolis, etc., R. Co. v. Caldwell* (1857), 9 Ind. 397; *Krenzer v. Pittsburgh, etc., R. Co.* (1898), 151 Ind. 587, 43 N. E. 649, 52 N. E. 220, 68 Am. St. 252; 1 R. C. L. 1192, and cases. Also in cases involving inanimate property. *Wright v. Brown* (1853), 4 Ind. 95, 58 Am. Dec. 622. For an elucidation of the doctrine see *Indianapolis Traction, etc., Co. v. Croly* (1913), 54 Ind. App. 566, 96 N. E. 973, 98 N. E. 1091.

The only other question presented is that the court erred in admitting certain testimony respecting experiments made subsequently to the

6. killing of the animals, to ascertain the distance at which objects could be seen in the light of the headlight of train No. 55 at said place. These observations were made under conditions shown to be practically the same as those that existed at the time of the killing of the animals. In order that evidence of such a character may be admissible, it is not essential that the conditions be exactly reproduced in all their details. If so reproduced, credible evidence of an experiment and its results would amount to demonstration, and would be conclusive on the issue involved. It is sufficient if the conditions under which the experiment was made are shown to have been substantially the same as those that existed in the transaction being investigated. If substantially the same, any departure goes to the weight rather than the

7. admissibility of the evidence. In determining whether the conditions are shown to be substantially the same, there is of necessity a requirement for the exercise of some discretionary



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power by the trial court. Under these principles the court did not err in admitting such evidence. 5 Ency. Evidence 473 *et seq*; *Chicago, etc., R. Co. v. Champion* (1893), 9 Ind. App. 510, 36 N. E. 221, 37 N. E. 21, 53 Am. St. 357, 375, note; 4 Chamberlayne, Mod. Law of Ev. §3170. Judgment affirmed.

NOTE.—Reported in 109 N. E. 70. As to trespassing animals, see 81 Am. St. 446. As to the duty of a railroad to keep a lookout for animals on the track on fenced roads or where no duty to fence exists, see 3 Ann. Cas. 591. As to the duty of a railroad to blow whistle or give other warning to animal on track, see Ann. Cas. 1915 B 462. See, also, under (1) 33 Cyc 1224; (2) 33 Cyc 1309; (3) 3 Cyc 303; (4) 3 Cyc 348; (6) 17 Cyc 285; (7) 17 Cyc 276.

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FUHRMAN v. FRECH ET AL.

[No. 8,642. Filed October 6, 1915. Rehearing denied December 17, 1915.]

1. CONTRACTS.—*Construction.—Waiver of Mechanic's Lien.*—A contract for the construction of a house providing that the contractor is to "transfer same to first party clear of all claims or incumbrances", is not to be construed as an agreement to transfer clear only of the claims and encumbrances of third persons, so that the contractor was thereby precluded from enforcing a mechanic's lien. p. 350.
2. APPEAL.—*Review.—Conclusiveness of Decision.*—Though the evidence is conflicting, the decision of the trial court can not be disturbed if there was some evidence to support it. p. 351.

From Superior Court of Allen County; *Carl Yaple*, Judge.

Action by August Fuhrman against William Frech and another. From a judgment for defendants, the plaintiff appeals. *Affirmed.*

*William Fruechtenicht* and *Creighton H. Williams*, for appellant.

*Thomas & Townsend*, for appellees.

IBACH, P. J.—Action by appellant against appellees to recover a money judgment for a balance claimed to be due appellant from appellees for con-

struction by appellant of a dwelling house on a lot owned by appellees, and to enforce a mechanic's lien for the amount due. The only error properly presented is the overruling of appellant's motion for new trial, for the reasons that the decision of the court is not sustained by sufficient evidence and is contrary to law.

Appellant was the original contractor, and contracted to "transfer same (house) to first 1. party, clear of all claims or incumbrances within ninety days from date." Appellees contend that appellant's right to a mechanic's lien was cut off by this language of the contract. Appellant urges that this was only an engagement to transfer the house clear of claims or incumbrances by others, but did not prevent the contracting party from asserting a lien for debts due him. The question has been disposed of in the case of *Carson, etc., Co. v. Cleveland, etc., R. Co.* (1914), 57 Ind. App. 357, 105 N. E. 503. In that case a subcontractor entered into a contract with the original contractor, and agreed to keep the building free and clear of all mechanic's liens on account of any work, labor or materials furnished by the party of the second part. It was claimed that this was only an agreement to keep the property free and clear of liens in favor of persons who might furnish material to or perform labor for the appellant as a subsequent contractor, but that it did not preclude appellant from enforcing a lien in its favor for a balance due it under the contract. The court held that the contract was not susceptible of such a construction, and that appellant was prevented from enforcing a lien in its behalf, citing numerous authorities to sustain its position.

The court also found against appellant that he was not entitled to a money judgment. The evi-

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dence showed that all the contract price had  
 2. not been paid by appellees, but they had a counterclaim because of the alleged failure of appellant's work to comply with specifications. On this point the evidence was conflicting, but there was evidence to support the court's decision, and it will not be disturbed. Judgment affirmed.

NOTE.—Reported in 109 N. E. 781. When work is completed with- in the contemplation of mechanics' lien laws, see 43 Am. St. 900. As to waiver of a mechanic's lien by contract inconsistent with lien, see 1 Ann. Cas. 954. As to stipulation in building contract against mechanics' liens as precluding contractor from filing lien, see Ann. Cas. 1913 E 562. See, also, under (1) 27 Cyc 263; (2) 3 Cyc 360.

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CINCINNATI GAS, COKE, COAL AND MINING COMPANY  
 v. UNDERWOOD.

[No. 8,409. Filed December 11, 1914. Rehearing denied October 6, 1915. Transfer denied December 17, 1915.]

1. MASTER AND SERVANT.—*Injuries to Servant.—Masterial Duty.—Safe Place to Work.—Complaint.*—In a servant's action for injuries caused by the falling of a scaffold used in connection with the operation of a sand crib, a complaint alleging facts showing that it was defendant's duty to furnish plaintiff a safe place to work, and that defendant failed to discharge such duty, whereby the injuries complained of resulted to plaintiff, was sufficient to withstand a demurrer. p. 355.
2. APPEAL.—*Review.—Evidence.*—The court on appeal will not determine the preponderance of the evidence, and if there is proper evidence on which the verdict may rest, it will not be reviewed. p. 355.
3. MASTER AND SERVANT.—*Injuries to Servant.—Evidence.—Verdict.*—Evidence disclosing that plaintiff was hired by defendant's foreman in charge of its sand boat and gravel plant as a fireman and workman, that such foreman, pursuant to directions from defendant erected a scaffold in a sand crib out of such material as he had on hand, that plaintiff knew nothing of the scaffold until he was directed to assist in repairing a screen in the sand crib, in the doing of which he was required to go upon the scaffold, and that the scaffold was constructed of defective and improper material, so that it gave way and precipitated plaintiff to the ground, producing the injuries complained of, was sufficient to sustain a verdict for plaintiff in an action against the master for such injuries. p. 356.

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4. **MASTER AND SERVANT.—Injuries to Servant.—Assumed Risk.**—A servant of mature years, of ordinary intelligence, and in full possession of all his faculties, must exercise his natural senses for his own safety, and if he is derelict in duty in this respect he can not recover for injuries received. p. 357.
5. **MASTER AND SERVANT.—Injuries to Servant.—Safe Place of Work.—Vice Principals.—Evidence.**—In an action for injuries to a servant by the collapse of a scaffold erected in a sand pit, where there was evidence showing that the scaffold was erected pursuant to directions from defendant to use such materials as were at hand, by an employe of defendant who had authority to direct the men and was the only person about the premises with authority to direct the work, the verdict for plaintiff was not contrary to law, since the evidence warranted the finding that such employe, in the construction of the scaffold, was a vice principal in charge of the master's work; it being the duty of the master, which he can not delegate so as to avoid liability, to use ordinary care to provide a reasonably safe working place for the servant, and also to furnish suitable and proper materials necessarily required to keep it safe. p. 358.
6. **MASTER AND SERVANT.—Injuries to Servant.—Defective Place of Work.—Fellow Servants.**—Assuming that an employe of defendant, while engaged in the erection of a scaffold was performing work incident to his employment so as to make him a fellow servant of plaintiff who was subsequently injured by the collapse of such scaffold, due to defective materials used in the construction, negligence of such employe in the construction of the scaffold would not exempt defendant from liability, since it was defendant's duty to furnish proper materials and its failure in this respect was negligence concurring with that of the fellow servant in producing the injury. p. 360.
7. **MASTER AND SERVANT.—Injuries to Servant.—Safe Place of Work.—Instructions.**—In an action for injuries to a servant by the collapse of a scaffold, an instruction that defendant was required to furnish plaintiff a reasonably safe place of work, and was bound to continuously exercise ordinary care to ascertain the condition of equipment and appliances, and was chargeable with notice that equipment and appliances would deteriorate and wear, as well as with notice of any defect ascertainable in the exercise of ordinary care, and was required to keep equipment and appliances in a reasonably safe condition, was a correct statement of the law and not misleading. p. 360.
8. **MASTER AND SERVANT.—Injuries to Servant.—Instructions.—Review.**—Where defendant had actual notice that there was generally a bad condition of things about plaintiff's place of employment, and gave to its foreman specific directions to do the best he could in building a scaffold with the materials at hand, etc., defendant's objection to instructions, in an action for injuries to

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plaintiff by the collapse of the scaffold, on the theory that defendant was not charged with any duty with respect to the condition of the working place, etc., was untenable. p. 361.

9. MASTER AND SERVANT.—*Injuries to Servant.—Instructions.—Form.*—An instruction that plaintiff had a “perfect” right to presume that the equipment and appliances were reasonably safe, was not rendered erroneous by the use of the word “perfect”. p. 362.

From Superior Court of Marion County (82,965);  
*Joseph Collier*, Judge.

Action by Edgar Underwood against the Cincinnati Gas, Coke Coal and Mining Company. From a judgment for plaintiff, the defendant appeals.  
*Affirmed.*

*Pogue, Hoffheimer & Pogue, Frank S. Roby, Ward H. Watson, Elias D. Salsbury and Sol. H. Esarey*, for appellant.

*Doan & Mathews*, for appellee.

SHEA, J.—Action by appellee against appellant to recover damages for personal injuries alleged to have been negligently inflicted upon him. The complaint in one paragraph alleges substantially the following: That appellant was a corporation conducting business in Marion County, Indiana, and on April 17, 1909, was operating a sand boat and gravel plant on White River near Morris Street in the city of Indianapolis, Indiana; that for the purpose of pumping the gravel it had an engine and boiler located on a flatboat on said river used to operate the pump which pumped the sand and gravel from the bottom of the river and carried it into a crib located on the bank. The cribs contained sieves for screening the gravel and sand and were about twenty-five feet high and five by six feet on the sides, constructed of four upright posts upon which planks were nailed closely together forming a long

crib or box with the posts at each corner, and situated on the inside thereof. Appellee was employed by appellant as fireman and workman on the boat, and was under the management, direction and control of one Curry who was the foreman in charge of the operation of the boat, and whose duties included the location and operation of the cribs. That appellant had located said crib and "constructed a scaffolding upon said crib for the purpose of affording a place for this plaintiff and other workmen to stand while in the performance of work for these defendants; that said scaffold was constructed by means of cross pieces being nailed upon each side of said crib and nailed to said upright posts within said crib and extending out beyond the sides of said crib for a distance of about one foot upon each side thereof, and that upon the extension of said cross pieces so nailed a plank or board was placed which formed said scaffolding"; that this scaffolding was situated about fifteen feet from the ground, and that it was necessary to be so constructed in order that persons might get within said crib to adjust the screens for the purpose of screening gravel as it was pumped out of the river and came into the crib; that appellee was ordered to go upon said scaffolding for the purpose of adjusting the gravel screen within the crib, and while so in the performance of his work under the direction of the foreman, said scaffolding gave way and fell to the ground, causing him to sustain serious injuries. The acts of negligence charged are that said scaffolding was negligently constructed in that it was nailed to said posts which were so rotten and decayed that they would not hold an ordinary nail, of which condition appellant had knowledge; that appellant negligently permitted the scaffolding so constructed to remain, and negligently ordered ap-

pellee to go upon same in the performance of his work; that by reason of the negligent construction, the nails pulled out of the rotten posts by the weight of appellee, and thereby caused the scaffolding to fall. It is alleged that appellee had no knowledge of the condition of the crib, nor that said posts were rotten and decayed, and that it was impossible for him to ascertain this for the reason that the posts to which the supports for the scaffold were nailed were inside and covered by the planks forming the sides of the crib; that it was impossible for him to have seen same by the exercise of ordinary care, and that he had nothing to do with the construction of the crib or scaffold. Appellant's demurrer to the complaint was overruled. An answer in general denial formed the issues submitted to the jury for trial. Finding and judgment for appellee for \$2,500.

The errors relied on for a reversal are that the court erred in overruling appellant's demurrer to the complaint and its motion for a new

1. trial. The complaint is vigorously assailed by appellant. The complaint avers with sufficient clearness that it was the duty of the master to furnish appellee, its servant, a safe place to work. It also charges a breach of the duty, resulting in the injuries complained of, and is therefore sufficient to withstand a demurrer. *Domestic Block Coal Co. v. DeArme*y (1913), 179 Ind. 592, 100 N. E. 675, 102 N. E. 99.

The grounds alleged for a new trial, so far as they are presented to this court are as follows: (1) The verdict of the jury is not sustained by sufficient evidence. (2) The verdict of the jury is contrary to law. (3) The court erred in giving to the jury

on its own motion instructions Nos. 1 to 2. 20 inclusive. This court will not weigh the evidence for the purpose of determining



where the preponderance lies. If proper evidence was heard by the jury upon which to base its verdict, this court will not review it. The evidence

discloses that appellee Underwood was hired

3. by Mr. Phillips, an employe of appellant company in charge of its sand boat and gravel plant, as described in the complaint. Several days before the injury complained of, Phillips, said foreman in charge of the plant, complained to appellant company and its officers of the condition of the sand cribs then in use, stating that he had no material with which to make necessary repairs. He was directed then by said company to use such material as he had, as they could not supply him with other things. It became necessary to move the crib in question from the position which it then occupied. Mr. Phillips was directed to do this work by the officers of the company. He was also directed to use such men as were employed about the place to assist him. Pursuant to this direction Phillips ordered Underwood to assist him in the work of moving the particular crib. This he did to the extent of driving the team hitched to the crib, with a rope about 100 feet in length, dragging it a distance of ——— feet, at which place it was raised to an upright position, and made fast to the ground. The evidence discloses that after it was so placed in position, the scaffolding in question was erected by Phillips. Appellee Underwood testified that Phillips did all the work; that he knew nothing of it until he was directed to assist in repairing the screen, testifying as follows: “Q. This scaffolding—was it on it when it was put up or was it put on afterwards? A. It was put on afterwards. Q. Who put it on? A. Mr. Phillips. Q. Were you present when he put it on? A. No, sir. Q. I asked you, were you up there at any time while he was putting this

scaffolding up? A. No, sir, I did not know this scaffold was up until I went out there." The evidence discloses that upon the inside of this particular crib, constructed substantially in the manner described in the complaint, were placed certain screens used for the purpose of separating the gravel from the sand, and it became necessary in some manner to repair these screens. Phillips directed appellee Underwood to assist him in this work by carrying certain materials from the ground up the ladder, an elevation of about fifteen feet, and handing them to him, Phillips, who was on the inside of the crib. It became necessary for Underwood to take his position on the scaffold to assist in the work. In so doing, he carried and used a crowbar. It is suggested in argument by appellant's learned counsel that the accident must have been caused in some way by appellee's effort to assist Phillips with the use of the crowbar. We have searched diligently for evidence of this kind, but the record fails to disclose any. The record itself discloses that the upright pieces to which the scaffolding was nailed were rotten and decayed, and insufficient to hold the scaffold in its proper position when subjected to Underwood's weight; that one side of said scaffolding, because of said condition of the timbers, gave way, precipitating appellee to the ground, and causing his injury. There was sufficient evidence upon which the jury might base its verdict, and it will not be disturbed on that account. *Evansville Gas, etc., Co. v. Robertson* (1914), 55 Ind. App. 353, 100 N. E. 689.

It is next urged that the verdict is contrary to law. It is a well settled principle of our law that a servant, a man of mature years, of ordinary  
4. intelligence, and in full possession of all his faculties must exercise his natural senses for

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his own safety, and failing so to do, must suffer the consequences. *McElwaine-Richards Co. v. Wall* (1906), 166 Ind. 267, 276, 76 N. E. 408. If appellee was derelict of duty in this respect, he can not recover. The facts disclose that appellee was hired

primarily to fire the engine, which was situated some distance away on a boat in the river. He was also required, when called upon, to assist the foreman Phillips in such other work as it became necessary to do about the premises. It becomes important, therefore, in the consideration of this question, to determine the relation which existed between Phillips and Underwood. If, in the construction of the scaffolding, which was done, according to the evidence, by Mr. Phillips, he was performing a detail of the work at hand in making the particular place safe at which both he and Underwood were required to work, then he was engaged in the work of a fellow workman, and appellant can not be held to be liable. *Perigo v. Indianapolis Brewing Co.* (1898), 21 Ind. App. 338, 52 N. E. 462.

But on the other hand, it is the duty of the master to use ordinary care to furnish a reasonably safe place in which his servants are to work, and this duty is a continuing one, which can not be delegated by the master so as to escape liability for injury resulting to the servants therefrom. *Republic Iron, etc., Co. v. Ohler* (1903), 161 Ind. 393, 68 N. E. 901; *Patterson v. Southern R. Co.* (1913), 52 Ind. App. 618, 99 N. E. 491. It is also the duty of the master to furnish suitable and proper materials with which, in this case, necessary repairs could be made to the crib in question, so as to make it a safe place to work. *Patterson v. Southern R. Co.*, *supra*; *Haakensen v. Burgess Sulphite Fibre Co.* (1912), 16 N. H. 443, 83 Atl. 804, Ann. Cas. 1913

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B 1122. The evidence discloses that Phillips was the man in charge of this work; that by direction of the officers of the company he hired and discharged employes; that he was the only person about the premises who had authority to direct the work, there being no other officer or employe of the company about the premises, and, as disclosed by the evidence heard, Phillips was the only man who ever gave orders or directions to appellee Underwood. We think upon this state of facts the jury was fully warranted in finding by its general verdict that Phillips was a vice principal in charge of the master's work in the construction of said scaffold. It can not be said that the verdict of the jury is contrary to law in this respect upon the condition of the record disclosed herein. Furthermore, it may be stated that the master had ample notice of the general condition of said crib in time to have furnished material, and have made the proper repairs. The direction of the master to Phillips to use such material as he had on hand was negligent conduct in the light of all the facts in this case, for which the master can not escape liability. It can not be said that the construction of this scaffold in which appellee Underwood states he did not participate in anyway, and of which he had no knowledge, was a mere incident of the employment, which would make Phillips, the builder thereof, a fellow servant of Underwood, thus enabling the master to escape liability. The duty of making the crib safe for use was delegated by the master to Phillips, and therefore the acts of Phillips were the acts of the master. In the case of *Patterson v. Southern R. Co.*, *supra*, the court at page 623 used this language: "It is recognized that the primary duty of providing a reasonably safe place for the servant to work, and safe tools and appliances with which to work is on the master,

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and this duty is a continuing one, which the master can not delegate to an employe and escape responsibility. If this duty is so delegated, the employe, no matter what his rank or grade may be, becomes a vice principal and not a fellow servant, and his act is the act of the master." If it could be held in this

case that Phillips was a coemploye of appellee Underwood, and that he negligently constructed the scaffold in question, it would not excuse appellant in this case, for its negligent failure to furnish proper material with which to do the necessary work of repairs about the premises. In other words, the negligence of the master in failing to furnish material with which to do the work concurred with the negligence of Phillips, and the master would therefore be liable. *Rogers v. Leyden* (1890), 127 Ind. 50, 26 N. E. 210; *Wabash R. Co. v. McNown* (1913), 53 Ind. App. 116, 99 N. E. 126, 100 N. E. 383; *Marietta Glass Mfg. Co. v. Pruitt* (1913), 180 Ind. 434, 102 N. E. 369. We can not say that the verdict of the jury is contrary to law.

Many instructions are complained of. Instruction No. 8 given by the court on its own motion reads as follows: "The law exacted of defendant the duty to furnish and provide the plaintiff with a reasonably safe place in which to perform his work. And that duty on the part of defendant did not end with simply providing safe equipment and appliances in the first instance, but the further duty was imposed upon defendants of continuously exercising ordinary care to ascertain the condition of such equipment and appliances. It was chargeable with notice of the tendency of the equipment and appliances to deteriorate, or wear out by use or exposure, and it was required to keep the equipment and appliances in a reasonably safe condition, and it was chargeable with notice of any

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defect which could have been ascertained by the exercise of reasonable care in that particular." It is stated in criticism of this instruction that the uncontradicted evidence was that appellee's injury was caused by a scaffold negligently constructed by a fellow servant; that the negligence in the construction consisted in attempting to fasten the scaffold supports to decayed posts. It is contended that appellant had no notice that anyone would nail a scaffold to the decayed post, or that any scaffold would be built, therefore, when the judge charged the jury that the duty was imposed upon appellant to continuously exercise care to ascertain the condition of the equipment, he assumed facts both outside the issue and the evidence. We think the instruction is not subject to the criticism of appellant's learned counsel, but that said instruction states the general principles of the law clearly, and that said principles are applicable to the facts proven and could not have misled the jury.

Instruction No. 9 given by the court on its own motion is also criticised, on the theory that appellant was not charged with any duty with re-

8. spect to the condition of the crib, or tendency of the wood to decay, or that the scaffold was dangerous, or that appellant had any knowledge whatever of the fact that a scaffold was erected or to be erected. It seems that appellant's learned counsel overlook the fact that appellant company had actual notice that there was generally a bad condition of things at the sand plant, and that Phillips was given specific directions, in effect, to do the best he could with the materials at hand, and in so doing, the scaffold was erected, as a result of which the injury occurred.

Instruction No. 10 is criticised because it uses the language that plaintiff had "a perfect right to pre-

sume" that the equipment and appliances on 9. the crib and scaffold in question were reasonably safe. The use of the word "perfect" is criticised. The language would have been more nearly in harmony with that generally used if the word "perfect" had been omitted, but we can not see that harm could result to appellant from the use of the word "perfect" in this case.

We have examined instructions Nos. 11 and 12, also criticised, and find no error which can be regarded as harmful to appellant. The instructions taken as a whole state the law fairly and correctly. We find no evidence of contributory negligence upon the part of appellee. We have also examined other questions which appear wholly technical. There is no error in this record which would warrant the court in reversing the judgment. Judgment affirmed.

NOTE.—Reported in 107 N. E. 28. For the different forms of statement of the general rule with respect to the master's duty as to places and appliances furnished to his servant, see 6 L. R. A. (N. S.) 602; on the master's nondelegable duties as to defects in scaffolds, platforms, etc., see 54 L. R. A. 69, 77. On the question of the duty of the master to furnish safe appliances as affected by the fact that defective appliances are prepared by a fellow servant, see 3 L. R. A. (N. S.) 500; 4 L. R. A. (N. S.) 220. As to the question of vice principalship as considered with reference to rank of superior servant, see 51 L. R. A. 513. And for vice principalship as determined with reference to the character of the act causing the injury, see 54 L. R. A. 33. As to liability of master for injuries to servant caused by fall of scaffolding, see 18 Ann. Cas. 611; Ann. Cas. 1913 B 1123. See, also, under (1) 26 Cyc 1389; (2) 3 Cyc 348; (3) 26 Cyc 1444; (4) 26 Cyc 1231; (5) 26 Cyc 1321; (6) 26 Cyc 1302; (7) 26 Cyc 1097, 1136; (8) 26 Cyc 1142; (9) 26 Cyc 1491.



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Fidler v. Gilchrist—60 Ind. App. 363.

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## FIDLER v. GILCHRIST ET AL.

[No. 8,580. Filed October 14, 1915. Rehearing denied December 17, 1915.]

1. JUDGMENT.—*Collateral Attack.*—*United States Courts.*—*Jurisdiction.*—Where the United States Circuit Court disregarded an intervening petition in a receivership proceeding, setting up a claim to certain funds derived from property sold, and ordered the receiver to forthwith pay such funds to a creditor, the State court can not entertain a proceeding to declare that such intervening petitioner has a superior lien on the fund in the hands of such creditor, since such proceeding is a collateral attack on the judgment of the federal court. p. 363.
2. JUDGMENT.—*Relief.*—*Forum.*—One who seeks relief from a judgment alleged to have been procured by fraud, mistake or collusion, must seek it by proper proceeding in the court where rendered, or by appeal. p. 365.
3. JUDGMENT.—*Conclusiveness.*—*United States Courts.*—Judgments and decrees of the Circuit Court of the United States, sitting in a particular state, are to be accorded such effect in the courts of that state, as would be accorded in similar circumstances to the judgments and decrees of state tribunals of equal authority. p. 365.

From Marion Circuit Court (17,840); *Charles Remster*, Judge.

Action by George W. Fidler against Hector M. Gilchrist and another. From a judgment for defendants, the plaintiff appeals. *Affirmed.*

*F. F. McClellan, D. D. Hensel and L. A. Guthrie*, for appellant.

*Gavin, Gavin & Davis*, for appellee.

SHEA, C. J.—The court sustained appellees' demurrer to appellant's amended complaint, and this ruling is the basis of the error assigned

1. for a reversal of this cause. The amended complaint filed in the spring of 1912 shows, among other things, that in a suit in the United States Circuit Court for Indiana, a receiver was appointed for certain leasehold and other property; that under the order of the court the receiver sold the property for \$11,500; that on December 7,

1907, the United States Court rendered its final decree in the case therein pending, and by such decree adjudged and ordered that the receiver should "forthwith" pay to the National Supply Company \$876, and to appellee Gilchrist \$1,500, with some interest, out of the proceeds of such sale. Pursuant to the decree of that court this money was paid to the appellees on December 7, 1907. Appellant now claims that the Federal court was wrong in adjudging this money to appellees; that he had filed in that court an intervening petition setting up a claim to \$1,200 of this money, which the Federal court overlooked and did not allow. He therefore asked the Marion Circuit Court, in effect, to correct the oversight, or error, or wrong, of the Federal court, and adjudge him to have a superior lien upon this fund, as the Federal court ought to have done, and require appellees to pay the same over to him. It is contended that this failure of the Federal court to give consideration to the intervening petition, gives this court jurisdiction of the subject-matter upon the theory that there was no adjudication in the Federal court, and that the money may be pursued into the hands of the present holders, appellees. It is not contended that the Federal court did not dispose of all of the property involved in the controversy therein, making a final order disposing of it to the appellees in this case. It is not contended that any authority exists in the State courts to change or overrule a decision of the Federal court. The effect of sustaining appellant's contention in this case would be to overrule, by indirection, a decision of the Federal court. It is a maxim of the law that you may not do by indirection what you may not do directly. The position of appellant amounts to a collateral attack in the State court upon a judgment of the Federal court.

We think it needs no extended citation of authority to show that this can not be done. *Larimer v. Krau* (1914), 57 Ind. App. 33, 103 N. E. 1102, 105 N. E. 936; *Bruce v. Osgood* (1900), 154 Ind. 375, 56 N. E. 25.

The remedy which was open to appellant seems to have been neglected or overlooked. A motion in

the Federal court to correct any error that

2. might have occurred, or an appeal from the court's order, was open to appellant. Just why these remedies were not resorted to is not clear, nor is it important in the determination of this cause. It is well settled that one who seeks relief from a judgment alleged to have been procured by fraud, mistake or collusion, must seek it by proper proceeding in the court where rendered, or by appeal. *Graham v. Boston, etc., R. Co.* (1886), 118 U. S. 161, 6 Sup. Ct. 1009, 30 L. Ed. 196; *Smith v. Hess* (1884), 91 Ind. 424; *Emerick v. Miller* (1902), 159 Ind. 317, 64 N. E. 28; *Bruce v. Osgood, supra*; *Larimer v. Krau, supra*; 2 Freeman, Judgments (4th ed.) §334.

Judgments and decrees of the circuit court of the United States sitting in a particular state, are to be accorded such effect in the courts of

3. that state as would be accorded in similar circumstances to the judgments and decrees of state tribunals of equal authority. *Crescent City, etc., Co. v. Butchers Union, etc., Co.* (1887), 120 U. S. 141, 7 Sup. Ct. 472, 30 L. Ed. 614.

No error was committed by the trial court in sustaining the demurrer to the complaint. Judgment affirmed.

NOTE.—Reported in 109 N. E. 796. As to conclusiveness of judgment on collateral attack, see 15 Am. St. 142. See, also, under (1) 23 Cyc 1055, 1057; (2) 23 Cyc 986; (3) 23 Cyc 1598.

**THE NATIONAL MOTOR VEHICLE COMPANY v. PAKE.**

[No. 8,597. Filed October 5, 1915. Rehearing denied December 28, 1915.]

1. **APPEAL.—Assignment of Errors.—Sufficiency of Complaint.**—An assignment of error that the complaint does not state facts sufficient to constitute a cause of action, presents no question on appeal in a cause commenced after the act of 1911 (Acts 1911 p. 415, §344 Burns 1914), relating to civil procedure went into effect. p. 368.
2. **MASTER AND SERVANT.—Injuries to Servant.—Verdict.—Answers to Interrogatories.**—Where the complaint in a servant's action for personal injuries proceeded on the theory that the servant continued in the employ of the master after he had knowledge that the spindle on a machine used by him was defective, on the promise of the master to put in a new spindle, a general verdict for plaintiff, while including a finding that there was a promise to put in a new spindle and a failure so to do, was not overcome by answers to interrogatories returned by the jury disclosing that the promise was to repair the spindle, since the conflict was not irreconcilable. p. 369.
3. **MASTER AND SERVANT.—Injuries to Servant.—Complaint.—Theory.—Instructions.**—Where the complaint in a servant's action for personal injuries did not aver that the servant had no knowledge of the defect complained of, but disclosed that he did have knowledge and relied on the master's promise to repair, it must be deemed as proceeding on the theory of a promise to repair and a failure to do so, so that an instruction to the jury stating the masterial duty of providing safe tools and appliances, and to continuously exercise reasonable care to ascertain the condition of machinery and appliances furnished, etc., was outside the issues and fatally erroneous. pp. 370, 372, 373.
4. **MASTER AND SERVANT.—Injuries to Servant.—Knowledge of Defect.—Assumption of Risk.**—At common law an employe continuing in the service of the master after notice of a defect augmenting the danger of the service, assumes the risk as increased by the defect, unless the master expressly or impliedly promises to remedy the defect. p. 372.
5. **APPEAL.—Instructions.—Presumptions.—Burden.**—The giving of instructions not applicable to the case made by the pleadings will be presumed to have been harmful error, and after such error is pointed out the burden is upon appellee to show by the record that the error was harmless. p. 372.

From Superior Court of Marion County (84,-350); *Joseph Collier*, Judge.

Action by Andrew G. Pake against the National

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National Motor, etc., Co. v. Pake—60 Ind. App. 366.

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Motor Vehicle Company. From a judgment for plaintiff, the defendant appeals. *Reversed.*

*Joseph E. Bell and George Shirts*, for appellant.

*Muter M. Bachelder and Harold K. Batchelder*, for appellee.

MORAN, J.—Appellee recovered a judgment in the sum of \$1,500 against appellant on account of an injury to his left eye, which occurred while he was operating an emery wheel in appellant's factory.

The errors relied upon for reversal are: (1) the complaint does not state facts sufficient to constitute a cause of action; (2) error in overruling appellant's motion for judgment on answers to interrogatories notwithstanding the general verdict; (3) error in overruling appellant's motion for a new trial.

The substance of the complaint, the theory and sufficiency of which becomes material in an examination of each of the errors presented, is as follows: On November 27, 1910, appellant was a corporation operating a large factory, in which it manufactured motors, tools and implements, and in this connection it operated an emery wheel for the purpose of grinding upon iron; the wheel revolved upon a spindle, which passed through a square hole in the center thereof and was propelled by electric power. Appellee's duties were to grind wrenches made of iron upon the emery wheel, and he had no other duties. It was appellant's duty to keep the emery wheel in condition for use for appellee, which it failed to do, in that the spindle became worn, where it passed through the wheel, giving the wheel a zigzag motion, rendering it dangerous to operate; that when it became worn appellee notified appellant of the danger and requested appellant to replace the old spindle by a

new one; at the time of such notice and request appellant informed appellee that it was not then prepared to replace the old spindle by a new one, but it would do so as soon as the spindle could be obtained and to continue using the same; pursuant to appellant's orders to continue using the wheel appellee continued to do so and in a careful and prudent manner, and while operating the same it swerved from its true position, and jerked a monkey wrench, which appellee was grinding from appellee's hands pulling it underneath the wheel and then upward and against his left eye; appellee was wearing glass goggles, it being necessary to do so in the operation of the wheel, and the wrench before striking appellee's eye came in contact with the goggles breaking the same, and forced a part of the broken glass into appellee's left eye causing a painful injury from which the sight in the left eye was destroyed producing a permanent injury to his damage in the sum of \$15,000.

The first assignment of error, viz., that the complaint does not state facts sufficient to constitute a cause of action is an initial attack upon the

1. sufficiency of the complaint for want of facts.

This cause having been commenced since an act, concerning proceedings in civil causes went into force (Acts 1911 p. 415, §344 Burns 1914), requiring a memorandum to be filed with a demurrer pointing out wherein the complaint is insufficient for want of facts, the above assignment of error raises no question for review. *Stiles v. Hasler* (1914), 56 Ind. App. 88, 104 N. E. 878; *Robinson v. State* (1912), 177 Ind. 263, 97 N. E. 929.

Appellant insists that the answers to interrogatories show that the verdict proceeds upon a different theory than that set forth in the complaint; and it was error to refuse to render judgment

on the same. The answers to the interrogatories disclose that the spindle upon which the emery wheel was connected revolved from 1,600 to 1,800 times per minute, and the speed of the wheel pulled the wrench from appellee's hands in a downward direction, which was an ordinary occurrence; that the revolving motion jerked the same from appellee's hands and carried it under and over the wheel so as to strike him in the face; it was not the force caused by the revolving motion that caused the injury; appellee had but two conversations with the foreman in reference to the machine, one some time before the injury and one a few minutes before; in the first conversation appellee informed the foreman that the spindle was too loose, that it rattled and caused too much lost motion; in the second conversation appellee told the foreman that the machine was not in shape to work on, and each time the foreman told appellee to proceed with the work; that it would not hurt him; appellee never requested appellant to put in a new spindle, but he did request that it be repaired; appellant promised to repair the same; that the machine had a more lateral or side motion than was necessary. The allegations of the complaint disclose that the relation of master and servant existed between appellant and appellee; at the time of the injury, and that the servant was familiar with the machine with which he was performing his labor; it is likewise alleged that there was a promise on the part of the master to put in a new spindle. The complaint proceeds upon the theory that the servant continued in the employ of the master after he had knowledge of the defect in the machine, on the promise of the master to put in a new spindle. The general verdict finds that all the material allegations



of the complaint have been established, among which were a promise on the part of appellant to put in a new spindle and a failure so to do, while the answers to interrogatories disclose that the promise was to repair the spindle. There is a slight conflict in other particulars, but as a whole, the conflict is not such as to be irreconcilable; hence the court did not err in overruling appellant's motion for judgment in its favor. *Marion Light, etc., Co. v. Vermillion* (1912), 51 Ind. App. 677, 99 N. E. 55, 100 N. E. 100; *Consolidated Stone Co. v. Summit* (1899), 152 Ind. 297, 53 N. E. 235; *Wright v. Chicago, etc., R. Co.* (1903), 160 Ind. 583, 66 N. E. 454; *Ohio, etc., R. Co. v. Trowbridge* (1890), 126 Ind. 391, 26 N. E. 64; *Town of Poseyville v. Lewis* (1890), 126 Ind. 80, 25 N. E. 593; *Rogers v. Leyden* (1891), 127 Ind. 50, 26 N. E. 210; *Graham v. Payne* (1890), 122 Ind. 403, 24 N. E. 216; *Indianapolis, etc., R. Co. v. Lewis* (1889), 119 Ind. 218, 21 N. E. 660; *City of South Bend v. Turner* (1901), 156 Ind. 418, 60 N. E. 271, 54 L. R. A. 396, 83 Am. St. 200; *Adams v. Antles* (1915), 57 Ind. App. 594, 105 N. E. 931.

This leaves for consideration the errors presented under the motion for a new trial. Complaint is made of the trial court in giving to the

3. jury upon its own motion instructions Nos. 11 and 15, and refusing to give instructions Nos. 3 and 4, as tendered by appellant. Instruction No. 11 is as follows: "It was the duty of appellant to provide plaintiff with reasonably safe machinery and appliances, on which plaintiff was required to perform his work in discharge of the duties under the employment. And that duty on the part of the defendant did not end with simply providing reasonably safe machinery and appliances in the first instance, but the further duty of continuously exercising reasonable care to ascertain the

condition of such machinery and appliances was imposed upon the defendant; and in that particular, the defendant was chargeable with notice of the natural tendency of machinery and appliances to deteriorate, or wear, by reason of use or exposure, and in that respect the defendant was chargeable with notice of any defect therein, which could have been ascertained by the exercise of reasonable care." The objection urged to this instruction is that it is entirely outside the issues in the cause. It has been uniformly held that where a complaint proceeds upon the theory of a defective place to perform the service by the servant or defective tools or appliances, that the complaint to be sufficient must disclose by proper averment that the servant had no knowledge of the defect or danger complained of. *Stone v. Bedford Quarries Co.* (1901), 156 Ind. 432, 60 N. E. 35; *Cleveland, etc., R. Co. v. Parker* (1900), 154 Ind. 153, 56 N. E. 86; *Consolidated Stone Co. v. Summit, supra*; *Peerless Stone Co. v. Wray* (1896), 143 Ind. 574, 42 N. E. 927; *Louisville, etc., R. Co. v. Sanford* (1889), 117 Ind. 265, 19 N. E. 770; *Baltimore, etc., R. Co. v. Roberts* (1903), 161 Ind. 1, 67 N. E. 530; *Cleveland, etc., R. Co. v. Morrey* (1909), 172 Ind. 513, 88 N. E. 932; *Indianapolis Traction, etc., Co. v. Mathews* (1912), 177 Ind. 88, 97 N. E. 320; *Columbia Creosoting Co. v. Beard* (1909), 44 Ind. App. 310, 89 N. E. 321. So it is clear that the allegations of the complaint confine it to the theory of a promise on the part of the master to repair the defect of the machinery on the request of the servant and its failing to do so. It can not proceed upon the theory of defective appliances nor an unsafe place in which to perform the service on the part of the servant, for he has alleged knowledge on his part as to the defects in the spindle. The common-law rule is that an employe who continues in

the service of his master after notice of defect augmenting the danger of the service, assumes

4. the risk as increased by the defect, unless the master expressly or impliedly promises to remedy the defect. *Indianapolis, etc., R. Co. v. Watson* (1888), 114 Ind. 20, 14 N. E. 721, 15 N. E. 824, 5 Am. St. 578; *Rodgers v. Leyden* (1891), 127 Ind. 50, 26 N. E. 210; *Hollingsworth v. Chicago, etc., R. Co.* (1903), 160 Ind. 259, 65 N. E. 750; *Standard Oil Co. v. Helmick* (1897), 148 Ind. 457, 47 N. E. 14; *Terre Haute, etc., R. Co. v. McCorkle* (1895), 140 Ind. 613, 40 N. E. 62; *Crum v. North Vernon Pump, etc., Co.* (1904), 34 Ind. App. 253, 72 N. E. 193; *East Chicago Iron, etc., Co. v. Williams* (1897), 17 Ind. App. 573, 47 N. E. 26; *Romona Oolitic Stone Co. v. Phillips* (1894), 11 Ind. App. 118, 39 N. E. 96; *Indianapolis Union R. Co. v. Ott* (1894), 11 Ind. App. 564, 38 N. E. 842, 39 N. E. 529.

Instruction No. 11 informed the jury, as aforesaid, that it was the duty of the master to provide reasonably safe machinery and appliances for

3. the use of his servants, and after thus providing machinery of this character, it was the master's duty to exercise continuously reasonable care to ascertain the condition of such machinery, and that the master was chargeable with notice of the deterioration of the same. The theory of the complaint, as aforesaid, was a promise on the part of the master to repair the defect in the machinery on the request of the servant and failure to do so. It is clear that this instruction is outside the issues joined in this cause.

Although an instruction may embody a correct principle of law, yet if it is not applicable to the case made by the pleadings, it is erroneous,

5. and being erroneous it is presumed to be harmful. *Indiana R. Co. v. Maurer* (1903), 160

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Ind. 25, 25 N. E. 156; *Shirk v. Mitchell* (1894), 137 Ind. 185, 36 N. E. 850; *Lindley v. Sullivan* (1893), 133 Ind. 588, 32 N. E. 738, 33 N. E. 361; *Plummer v. Indianapolis Union R. Co.* (1914), 56 Ind. App. 615, 104 N. E. 601; *Red Men's, etc., Assn. v. Rippey* (1914), 181 Ind. 454, 103 N. E. 345, 104 N. E. 641, 50 L. R. A. (N. S.) 1006; *Romona Oolitic Stone Co. v. Phillips* (1894), 11 Ind. App. 118, 39 N. E. 96; *Chicago, etc., R. Co. v. Thrasher* (1905), 35 Ind. App. 58, 73 N. E. 829; *Nickey v. Dougan* (1905), 34 Ind. App. 601, 73 N. E. 288; *Citizens St. R. Co. v. Jolly* (1903), 161 Ind. 80, 67 N. E. 935; *Cleveland, etc., R. Co. v. Case* (1910), 174 Ind. 369, 91 N. E. 238; *Southern Ind. R. Co. v. Moore* (1902), 29 Ind. App. 52, 63 N. E. 863; *Neely v. Louisville, etc., Traction Co.* (1913), 53 Ind. App. 659, 102 N. E. 455; *Evansville, etc., R. Co. v. Hoffman* (1914), 56 Ind. App. 530, 105 N. E. 788. The burden is upon appellee in this case, after appellant has pointed out an error presumed to be prejudicial, to show the contrary by the record. *Louisville, etc., Traction Co. v. Korbe* (1911), 175 Ind. 450, 93 N. E. 5, 94 N. E. 768; *Neely v. Louisville, etc., Traction Co., supra*; *Cleveland, etc., R. Co. v. Case* (1910), 174 Ind. 369, 91 N. E. 238.

In *Southern Ind. R. Co. v. Moore, supra*, the court informed the jury that it was the duty of the master to exercise care and diligence in the examina-

3. tion and inspection of the place of the performance of service by the servant, as to enable him to know that it was safe, so far as human foresight could know. This was held to be erroneous, that it could only be cured by withdrawal; as it was only the duty of the master to furnish a reasonable safe place for his employe to perform the work. It was further held in this case that if instructions were in-

consistent and calculated to mislead the jury or leave it in doubt as to the law, it is cause for reversal.

In view of the fact that the issue the jury was called upon to try was based upon an alleged promise to repair the defect in the machine, the instruction brought into the case an element beyond the issues, and from a careful examination of the entire record we are not satisfied that appellant was not harmed by the giving of this instruction. The other errors presented are not likely to occur on a retrial of the cause and we will refrain from considering them. Judgment reversed with instructions to the lower court to grant a new trial.

NOTE.—Reported in 109 N. E. 787. See, also, under (1) 3 C. J. 1356; (2) 38 Cyc 1929; (3) 26 Cyc 1494; (4) 26 Cyc 1196; (5) 3 Cyc 386.

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**BENKOWSKI v. SANDERS & EGBERT COMPANY.**

[No. 8,806. Filed October 28, 1915. Rehearing denied December 31, 1915.]

1. MASTER AND SERVANT.—*Injuries to Servant.*—*Contributory Negligence.*—*Apparent Hazards.*—*Statutes.*—The Employer's Liability Act of 1911 (Acts 1911 p. 145, §§8020b, 8020c Burns 1914), applies to any person, firm or corporation employing five or more persons, and under its provisions an employe may not be charged with contributory negligence which will defeat his recovery, by reason of dangers or hazards inherent or apparent in his employment. p. 376.
2. MASTER AND SERVANT.—*Injuries to Servant.*—*Contributory Negligence.*—*Statutes.*—*Instructions.*—In a servant's action for personal injuries, controlled by the Employer's Liability Act (Acts 1911 p. 145, §§8020b, 8020c Burns 1914), an instruction stating the master's duty to furnish proper appliances, etc., and that plaintiff was not chargeable with contributory negligence to the degree that a recovery on his part would be defeated, because he used a defective appliance furnished, even though the dangers and hazards incident to the use of such appliance were inherent and apparent to him, correctly stated the law, and its refusal was reversible error in the absence of any other instruction covering the subject-matter. p. 376.

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3. MASTER AND SERVANT.—*Injuries to Servant.—Assumption of Risk.—Choice of Unsafe Way.*—The doctrine of assumed risk does not obtain in an action brought under the statute for injuries to a servant, so that a plaintiff is not necessarily precluded from recovery merely because he knowingly and voluntarily chose the more unsafe of two ways in doing his work, but it is for the jury to determine whether the danger was such that a person of ordinary prudence might reasonably have believed that it could be safely encountered by the exercise of proper caution. p. 378.
4. MASTER AND SERVANT.—*Safety of Appliances.—Duty of Inspection.—Statutes.*—While certain provisions of the Employer's Liability Act 1911 impose specific duties on persons engaged in the construction of buildings, to provide specific appliances for the protection of employes, §4 of the act (Acts 1911 p. 597, §3862d Burns 1914) requiring employers to see and require that all metal, wood, machinery, appliances, etc., are carefully selected, inspected and tested, so as to detect and exclude defects and dangerous conditions, does not make the employer an insurer of the workman's safety or require that he shall furnish tools and appliances free from defects, but imposes merely the general duty of selection, inspection and testing, which is no more than his common-law duty. pp. 379, 380.
5. MASTER AND SERVANT.—*Negligence.—Statutory Duties.*—Where the statute imposes a specific duty on the employer, his breach thereof constitutes negligence, but a somewhat different rule applies where duty imposed is merely general. p. 380.
6. MASTER AND SERVANT.—*Liability for Injuries.—Statutes.*—Neither §8020b Burns 1914, Acts 1911 p. 145, nor §3862d Burns 1914, Acts 1911 p. 597, as applicable to an action for injuries to a servant by reason of the defective condition of an appliance furnished by the master, changes the common law with reference to the employer's liability, except that where negligence of the employer has been shown the defenses of assumption of risk, and of contributory negligence because of dangers and hazards inherent in the employment, are removed, and the burden of showing that the employer did not know of the defect, or was not chargeable with knowledge, and of proving contributory negligence, is placed on the employer. p. 381.

From St. Joseph Superior Court; *Arthur L. Hubbard*, Judge *Pro Tem*.

Action by Joseph Benkowski against the Sanders & Egbert Company. From a judgment for defendant, the plaintiff appeals. *Reversed*.

*W. N. Bergan*, *P. C. Fergus* and *Hubbell*, *McInerny*, *McInerny & Yeagley*, for appellant.

*Slick & Slick*, for appellee.

IBACH, P. J.—Action by appellant against appellee for personal injuries sustained while employed in appellee's sawmill, which injury was alleged to have been caused by a defective skid furnished by appellee to appellant for him to use in the work which he was ordered to do, namely, the unloading of logs from a flatcar. There was a trial by jury, and a verdict for appellee was returned and judgment rendered on the verdict. The errors assigned for reversal all arise on the overruling of appellant's motion for new trial.

This case involves the construction of the act of 1911. Acts 1911 p. 145, §§8020b, 8020c Burns 1914. The cause seems to have been tried by the court on the theory that this act made no change in the common law.

Among the errors complained of is the court's refusal to give instruction No. 12 on appellant's motion, in the following words: "If you find

1. from the evidence in this case that the defendant was engaged in business in the city of South Bend, St. Joseph County, Indiana, and employed more than five (5) persons in such business, and such business consisted of the manu-

2. facturing of lumber in a manufacturing plant, and if you find from the evidence that the plaintiff on the 6th day of February, 1912, was employed by said defendant to work in its said manufacturing establishment or plant, then I instruct you it was the duty of said defendant to furnish reasonably safe appliances to said plaintiff with which to do the work which he was instructed to do, and said defendant was required, under the law, to exercise reasonable care and diligence to see and know that such appliances so furnished were safe to be used by the plaintiff in the labor which he was to do for said defendant and the plaintiff is not charge-



able with contributory negligence to the degree that a recovery on the part of the plaintiff would be defeated, because he used the defective appliance furnished, even though the dangers and hazards incident to the use of such appliance were inherent and apparent to the employe."

The act of 1911, *supra*, applies to any person, firm, or corporation while engaged in business, trade or commerce within this State, and employing in such business, trade or commerce five or more persons. Appellee does not deny that this act applies to the present action. Section 2 of this act (§8020b Burns 1914, *supra*), provides, "In actions brought against any employer under the provisions of this act for the injury or death of any employe, it shall not be a defense that the dangers or hazards inherent or apparent in the employment in which such injured employe was engaged, contributed to such injury." Under this provision of the statute, instruction No. 12 was correct. In the case of *Vandalia R. Co. v. Stilwell* (1914), 181 Ind. 267, 104 N. E. 289, it was said "The defense of the hazards and dangers inherent or apparent in the employment contributing to the injury is taken away." The language of the statute seems to be perfectly plain, that an employe may not be charged with contributory negligence which will defeat his recovery, by reason of dangers or hazards inherent or apparent in his employment. No other instructions covered the subject-matter of instruction No. 12, therefore it was reversible error for the court to refuse to give it. See, also, *American Car, etc., Co. v. Wyatt* (1915), 58 Ind. App. 161, 108 N. E. 12.

Complaint is also made of the giving of instructions Nos. 4, 5 and 6, at appellee's request, as follows: "(4) An employe of mature age, experienced in the work it is his duty to perform for his em-

ployer, is bound to avoid, if possible, and practicable, all known dangers, if he can do so and perform efficiently the work he is required to perform. If he unnecessarily and of his own volition, with knowledge of the danger, undertakes to do the work in an unsafe way, when he could have, and knows he could have, performed the work in a safe way, and is injured by reason of his choice of an unsafe way, then he cannot recover for such injury.

(5) If you find that there was a safe way or ways in which plaintiff could have mounted the car on which he was working at the time of his injury of which plaintiff at the time knew, and that, with such knowledge, plaintiff voluntarily chose to mount the car in an unsafe way, knowing that it was unsafe and was injured by reason thereof, then he can not recover in this action. (6) I instruct you that if there are two ways in which an employe can perform a given service in the employer's service, one safe and the other unsafe, and he, with full knowledge of the safety of the one and unsafety of the other, voluntarily chooses the unsafe way and is thereby injured, then he can not recover for such injury."

In a case such as this, brought under a statute which specifically removes the defense of assumption of the risk, and in which that doctrine does not

obtain, a servant who, with knowledge,

3. voluntarily adopts the more unsafe of two ways of doing work, is not necessarily precluded from recovery. *American Car, etc., Co. v. Wyatt, supra; Kingan & Co. v. Gleason* (1914), 55 Ind. App. 684, 689, 101 N. E. 1027. In the latter case it was said, "In cases such as the one before the court, the doctrine of assumption of risk does not obtain; and, if the rule stated is to be applied in such a case, it must be sustained under the principle of contributory negligence. \* \* \*

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In determining whether a servant was guilty of contributory negligence by selecting a way known to be dangerous where a safe way or a safer way of doing the work was open to him, it is proper to consider all the surrounding facts and circumstances. If the danger incident to the mode adopted was open and obvious, and of a character so imminent and threatening that no man of ordinary prudence would have taken the chances of encountering it; and, if the facts are such that no reasonable mind could reach any other conclusion, then the question is one of law and the court may say that the servant was guilty of contributory negligence in adopting such dangerous course. On the other hand, if the facts are of such a character that a person of ordinary prudence might have reasonably believed that the danger could be safely encountered by the exercise of proper caution, or where the facts are such that reasonable minds might differ in this regard, the question is one for the jury." From this expression of the law it is apparent that the trial court in the present case was in error when in instructions Nos. 4, 5 and 6 it told the jury as a matter of law that if the plaintiff voluntarily chose to mount the car in an unsafe way, knowing it was unsafe, he could not recover, without reference to whether a person of ordinary prudence might have reasonably believed that the danger could be safely encountered by the exercise of proper caution.

Appellant also contends that the following language of §4, Acts 1911 p. 597, §3862d Burns 1914, applies to the facts of this case: "It is here-

4. by made the duty of all owners, contractors, sub-contractors, corporations, agents or persons whatsoever, engaged in the \* \* \* operation or management of any machinery, mechanism or contrivance \* \* \* to see and to re-

quire that all metal, wood \* \* \* machinery, appliances, ways, works, plants, tools, all contrivances, and everything whatsoever used therein, are carefully selected, inspected and tested, so as to detect and exclude defects and dangerous conditions.”

Appellant insists that this language imposes on an employer situated as was appellee, a duty greater than its common-law duty. There are other provisions of the act of 1911, *supra*, which impose specific duties on persons engaged in the construction of buildings, to provide specified kinds of flooring, staging, scaffolding, and protections for the workers engaged in such work, but the portion of §4 quoted, which purports to apply to persons other than those engaged in the construction of buildings,

imposes merely general duties, and not

5. specific duties. Where a statute lays a specific duty on an employer, violation on his part of such specific duty is negligence. *Suelzer v. Carpenter* (1915), 183 Ind. 23, 107 N. E. 467; *Davis v. Mercer Lumber Co.* (1905), 164 Ind. 413, 420, 73 N. E. 899; *Monteith v. Kokomo, etc., Co.* (1902), 159 Ind. 149, 152, 64 N. E. 610, 58 L. R. A. 944. Where merely general duties are imposed, a somewhat different rule is applied. *Monteith v. Kokomo, etc., Co.*, *supra*, 151.

In this case the language quoted from the statute would make it the duty of appellee to see and to re-

quire that the skid with which appellant was

4. working, was carefully selected, inspected and tested, so as to detect and exclude defects and dangerous conditions. There is no requirement that the employer shall furnish tools, free from defects, he is not made an insurer of the employe's safety, he is required only to see that the tools are carefully selected, inspected and tested, in order to exclude defects and dangerous conditions, and it seems to us

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that when he has used the reasonable care of an ordinarily prudent man in this selection, inspection and testing, he has fulfilled the requirement of the statute, and that it imposes on him no more than his common-law duty. It would seem, therefore, that

the two statutes above mentioned as appli-

6. cable in this action do not change the common law relative to the same subject-matter, except that where negligence of the employer has once been shown, the defenses of assumption of the risk, and of contributory negligence because of dangers and hazards inherent in the employment, are removed, and the burden of proving that the employer did not know of the defect or was not chargeable with knowledge, and of proving contributory negligence, is placed on the employer. Other errors complained of will probably not arise on a new trial.

For the errors indicated, the judgment is reversed, and the cause is remanded for new trial.

NOTE.—Reported in 109 N. E. 942. As to assumption of risk where danger is obvious, see 119 Am. St. 438. As to duty of master to inspect tools and instruments furnished servant, see 1 L. R. A. (N. S.) 944. As to the care required of a master in providing appliances, see 1 Ann. Cas. 340. As to statutes affecting defense of contributory negligence in actions by servants against masters, see 5 Ann. Cas. 633. See, also, under (1) 26 Cyc 1229; (2) 26 Cyc 1507; (3) 26 Cyc 1180; (4) 26 Cyc 1102; (5) 26 Cyc 1090; (6) 26 Cyc 1421.

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## ROOK ET AL. v. THE STRAUS BROTHERS COMPANY.

[No. 8,924. Filed January 4, 1916.]

1. APPEAL.—*Presenting Error.—Burden.*—It devolves on appellants to present to the court the error relied on substantially as required by the rules of the court. p. 382.
2. APPEAL.—*Briefs.—Waiver of Error.*—Where appellants' brief wholly failed to comply with the requirements of clause 5 of Rule 22, with reference to setting out points and authorities, and there was no effort to amend after the defect had been pointed out by appellee's brief, the errors alleged must be treated as waived. p. 383.

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3. **APPEAL.—Rules of Court.—Effect.**—The rules of the court on appeal are binding upon it as well as upon the litigants, and there must be a substantial compliance therewith before the court can assume to pass on the merits of an appeal. p. 383.

From Adams Circuit Court; *Charles E. Sturgis*, Special Judge.

Action between the Straus Brothers Company and Rhoda C. Rook and others. From a judgment for the former, the latter appeal. *Affirmed.*

*John F. LaFollette, Emerson McGriff and S. A. D. Whipple*, for appellants.

*Hooper & Lenhart and Heller, Sutton & Heller*, for appellee.

FELT, P. J.—This is an appeal from a judgment quieting the title to certain real estate. There was a special finding of facts on which the trial court stated its conclusions of law. The errors assigned seek to bring into review the action of the court in ruling on the demurrer to the complaint, in overruling appellants' motion for a new trial, and in its conclusions of law stated on the special finding of facts.

It is insisted by appellee that no questions are presented because of defects in the transcript, in the assignment of errors, and in the preparation of appellants' briefs. Our examination of the record and assignment of errors convinces us that there is much merit in many of the objections urged by appellee, but it is unnecessary for us to determine the questions other than those relating to the briefs.

It devolves upon the appellants to present to the court the error relied on for reversal of the judgment and to do so in substantial compliance

1. with the rules of the court. Under "points and authorities" appellants state numer-

ous abstract propositions of law, but

2. neither here nor at any other place in their briefs do they make any specific application of any of such points to any particular
3. lar question arising under any one of the alleged errors relied on for reversal of the judgment.

Appellee in its brief filed in July, 1914, duly pointed out the defects and appellants have taken no steps to obtain leave to amend their briefs, or in any way to remedy the defects. The rules are binding on the court as well as upon the litigants and there must be a substantial compliance therewith before this court can assume to pass upon the merits of the appeal. Clause 5 of Rule 22 provides that "the briefs shall contain, *under a separate heading of each error relied on*, separately numbered propositions or points, stated concisely and without argument or elaboration, together with the authorities relied on in support of them." The rule is plain and has been interpreted and enforced by many decisions. Its purpose is to expedite the business of the court by presenting in a concise and definite way each error relied on, so that the court may without unnecessary delay or speculation apprehend and decide the questions relied on for reversal. Questions not duly presented are waived. The briefs in this case do not show a substantial compliance with the rule. *Chicago, etc., R. Co. v. Dinius* (1913), 180 Ind. 596, 626, 103 N. E. 652; *Ingle v. State* (1914), 182 Ind. 198, 207, 106 N. E. 373; *Bray v. Tardy* (1914), 182 Ind. 98, 99, 105 N. E. 772; *Kaufman v. Alexander* (1913), 180 Ind. 670, 672, 103 N. E. 481; *Palmer v. Beall* (1915), *ante* 208, 110 N. E. 218, and cases cited. Judgment affirmed.

NOTE.—Reported in 110 N. E. 1006. See, also, under (1) 3 Cyc 275; (2) 3 C. J. 1428, 1431; 2 Cyc 1017; (3) 11 Cyc 743.



**SUPREME LODGE OF THE MODERN AMERICAN FRATERNAL ORDER v. WATKINS.**

[No. 8,946. Filed January 4, 1916.]

1. **INSURANCE.—Breach of Warranty.—Avoiding Contract.—Pleading.**—The breach of a promissory warranty, as an agreement of forfeiture of the policy if the insured should use alcoholic liquor to excess, merely renders the policy voidable at the election of the insurer, and answers grounded on such a breach must, to be good, show an election to avoid the policy and that no premiums were received after the breach, or, if received, an offer to return the premiums. p. 385.
2. **INSURANCE.—Breach of Warranty.—Pleading.**—An answer alleging the violation by insured of a warranty as to an existing fact, must allege an offer to return the premiums paid. p. 385.

From Superior Court of Marion County (91,-707); *Clarence E. Weir*, Judge.

Action by Carrie E. Watkins against the Supreme Lodge of the Modern American Fraternal Order. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

*J. E. Martin, F. F. James and John W. O'Hara*, for appellant.

*Guilford A. Deitch and Frank G. West*, for appellee.

**IBACH, C. J.**—Error is assigned in the sustaining of demurrers to the second, third, fifth and sixth paragraphs of appellant's answer to appellee's complaint on a policy of life insurance issued by appellant on the life of Francis M. Watkins. The second, fifth and sixth paragraphs allege a breach by Watkins of a promissory warranty by which he agreed that if he should use alcoholic liquor to excess, his contract should be forfeited, and that such breach of warranty was unknown to appellant until after Watkins' death, and that it worked a forfeiture of the policy. Breaches of such promissory

warranties as this one do not make a contract  
1. of insurance void, but merely render it void-  
able at the election of the insurer. In order  
to avoid the contract, the insurer must return the  
premiums received after the breach. Appellant's  
answers, to be good, must have shown an election to  
avoid the policy, and appellant should have al-  
leged an offer to return the premiums which were re-  
ceived after the breach, or averred that no premiums  
were received after that time. *Supreme Tribe, etc.*  
*v. Lennert* (1912), 178 Ind. 122, 98 N. E. 115;  
*Modern Woodmen, etc. v. Young* (1915), 59 Ind.  
App. 1, 108 N. E. 869. The third paragraph of  
answer alleges a violation of a warranty as to  
2. an existing fact, namely, the nonuse of in-  
toxicating liquors at the time the policy was  
issued, but no offer to return premiums is alleged,  
and this paragraph is also bad. Judgment affirmed.

NOTE.—Reported in 110 N. E. 1008. As to representations of as-  
sured as warranties see 37 Am. St. 372. As to scope and effect of  
provisions in policies of insurance forbidding use of intoxicating liq-  
uor see 15 L. R. A. (N. S.) 206; 25 L. R. A. (N. S.) 1241. As to  
the necessity that a life insurance company in electing to rescind a  
policy on the ground of breach of warranty or false statement in the  
application return or offer to return the premiums received, see Ann.  
Cas. 1914 A 971. See, also, under (1) 25 Cyc 821, 921.

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### NICHOLSON v. SMITH.

[No. 8,793. Filed January 4, 1916.]

APPEAL.—*Review.*—*Evidence.*—*Weight and Sufficiency.*—The court  
can not weigh the evidence on appeal, so that where the evidence is  
conflicting and susceptible to more than one inference the judg-  
ment of the trial court will not be disturbed.

From Pike Circuit Court; *John L. Bretz*, Judge.

Action by William Nicholson against Rawleigh  
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Smith. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

*Frank E. Gilkison*, for appellant.

*Harry R. Lewis* and *Samuel M. Emison*, for appellee.

SHEA, J.—This was an action in replevin brought in the Knox Circuit Court by appellant Nicholson against appellee, and on a change of venue taken to the Pike Circuit Court. The complaint was in the usual form of replevin, asking for possession of the boat "Mary H", together with the engine and equipment. Appellee answered in three paragraphs; the first a general denial; the second averring in substance, that appellee bought the boat from one James Hobbs under the following written agreement:

"Whereas Wm. Nicholson is indebted to me in the sum of \$200 interest thereon at 6% per annum from May 10, 1910, as shown by his promissory note of that date. And whereas the said Nicholson has turned over to me a certain boat, which boat is named 'Mary H.' as security for said debt. And whereas the said Nicholson has not paid said debt and redeemed said boat, although the said debt is long past due; and whereas the said Nicholson has authorized the undersigned to sell said boat, the proceeds thereof to be applied on said note and debt. Now by this instrument, because of the reasons above set forth, and the authority vested in me, I, the undersigned, sell and transfer to Rawleigh Smith the said boat 'Mary H.' for the sum of \$140, the receipt of which is hereby acknowledged. In witness whereof, I have set my hand this 7th day of October, 1911.

James Hobbs."

That the boat was turned over to Hobbs by appellant to be his absolute property about May 22,

1911, to secure the note referred to in the agreement, with instructions to sell it and apply the proceeds on the note; that appellee bought the boat in good faith, for a valuable consideration, under these conditions. The third paragraph of answer is substantially the same as the second, except that it avers that the indebtedness was that of Sarah Hobbs, instead of James Hobbs, and that James Hobbs acted as her agent. Appellant filed a reply in general denial to the second and third paragraph of answer. A trial of the issues by the court resulted in a finding and judgment for appellee; that he was the owner of the boat, engine and equipment described in the complaint and entitled to possession together with costs.

The only error assigned for a reversal is the overruling of appellant's motion for a new trial, in support of which it is urged that the finding and decision of the court is not sustained by sufficient evidence, and is contrary to law. Appellant earnestly insists that the evidence does not sustain either of appellee's affirmative paragraphs of answer.

The evidence discloses that appellant was indebted to the wife of James Hobbs in the sum of \$200, evidenced by a promissory note. Appellant was also the owner of certain boat known as "Mary H" which he turned over to James Hobbs. The purpose for which the boat was so delivered constitutes the chief point in dispute. Appellant testifies that he delivered the boat to Hobbs to be used by said Hobbs in hauling corn, the profits to be divided between them; that the boat was not to be sold without appellant's consent. Hobbs testifies that the boat was to be turned over to him to be sold, the amount derived to be applied on the debt due Hobbs' wife. The boat was sold to appellee for \$140 cash, which amount was applied on the note.

Hobbs testifies that he also credited appellant with \$60 due him from appellant on account. Each of these theories is supported by the statement of witnesses, as well as by circumstantial evidence.

Under the well-settled rule of both this court and the Supreme Court we can not weigh the evidence. The cause was tried by the court without the intervention of a jury. The court heard the witnesses testify, observed their manner and conduct upon the witness stand, and is therefore the best judge of the weight to be given their testimony. More than one inference can be drawn from the facts as shown by the record. Under such circumstances this court will not disturb the judgment of the court below. *Peabody-Alwert Coal Co. v. Yandell* (1913), 179 Ind. 222, 100 N. E. 758; *Union Nat. Bank v. Finley* (1913), 180 Ind. 470, 103 N. E. 110; *Abelman v. Haehnel* (1914), 57 Ind. App. 15, 24, 103 N. E. 869. Judgment affirmed.

NOTE.—Reported in 110 N. E. 1007. See, also 3 Cyc 360.

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### SPADE v. HAWKINS, ADMINISTRATOR.

[No. 8,998. Filed January 5, 1916.]

1. HUSBAND AND WIFE.—*Interest in Estate of Deceased Husband.—Adulterous Wife.—Statutes.*—In order that §3034 Burns 1914, §2496 R. S. 1881, may be invoked to cut off the right of a surviving wife to the one-third interest in fee simple given her by §3014 Burns 1914, §2483 R. S. 1881, in the real estate of her deceased husband, it must appear that she had abandoned her husband and that at the time of his death she was living apart from him in adultery. p. 391.
2. HUSBAND AND WIFE.—*Interest in Estate of Deceased Husband.—Adulterous Wife.—Findings.*—"From Time to Time".—A special finding that defendant, a surviving widow, during a certain number of years had been "living from time to time in the practice of adultery with parties whose names are not disclosed by the evidence" could not support a conclusion of law that she was precluded from participating in her husband's estate by virtue of §3034 Burns 1914, §2496 R. S. 1881, since the finding did not com-

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pel the inference that she was living in adultery at the time of her husband's death, but was at most a finding that occasionally she was guilty of adultery, the phrase "from time to time" being synonymous with "occasionally", "at intervals", "now and then". pp. 392, 393, 394, 396, 398.

3. **APPEAL.—Review.—Special Findings.—Inferences.**—As a general rule evidentiary matter in a special finding will be disregarded, and nothing can be added by presumption, inference or intendment, while silence upon a material point is equivalent to a finding against the party having the burden of proof, but where primary facts found lead to but one conclusion the ultimate fact need not be stated and will be considered as proven. p. 392.
4. **HUSBAND AND WIFE.—Adultery of Wife.—Evidence.**—A single act of adultery by a wife does not force the conclusion that she was living in adultery within the meaning of §3034 Burns 1914, §2496 R. S. 1881, but the fact that she committed such act under circumstances showing a deep degree of abandonment may be submitted to the jury for consideration in determining her course of life at the time of her husband's death. p. 394.
5. **HUSBAND AND WIFE.—Adultery of Wife.—Statutes.**—Section 3034 Burns 1914, §2496 R. S. 1881, precluding an adulterous wife from participating in the estate of her deceased husband, contemplates not only a relation wherein the wife after abandoning her husband is found at the time of his death domiciled with a man other than her husband in a state of adultery, but also a status wherein an inclination to adultery is a present element with the purpose and practice of following such inclination to its logical conclusion at convenience and whenever opportunity affords. p. 395.
6. **HUSBAND AND WIFE.—Adultery of Wife.—Evidence.**—Evidence that a wife, after abandoning her husband, gave birth to two illegitimate children, the last of whom was born two years before her husband's death, but which failed to show any improper conduct on her part from the time the last child was born to the time of her husband's death, was insufficient to support a finding against her on the charge that she was living in adultery at the time of her husband's death. p. 396.
7. **EVIDENCE.—Chastity and Virtue.—Presumptions.**—In the absence of evidence to the contrary, a woman is presumed to be chaste and virtuous, while if proven to have been unchaste at a certain time a presumption of a continuance of such unchastity is indulged under some circumstances, but the latter presumption is not without limitation and would not apply against a woman whose life for two years following adulterous living bore all the *indicia* of chastity. p. 397.

From Pike Circuit Court; *John L. Bretz*, Judge.

Action by Henry H. Hawkins, administrator of the

estate of Lafayette Spade, deceased, against Martha Spade and others. From the judgment rendered, the defendant named appeals. *Reversed.*

*Frank Ely and John K. Chappell, for appellant.*  
*Richardson & Taylor, for appellee.*

CALDWELL, J.—Appellee, Henry H. Hawkins, as administrator of the estate of Lafayette Spade, deceased, filed his petition in the Pike Circuit Court, asking an order for the sale of a 27-acre tract of land owned by decedent, to make assets for the payment of the debts of the estate. Appellant, the widow, and also the children of decedent were named as defendants. In addition to the averments necessary to the procuring of such an order, there were other allegations to the effect that appellant and decedent intermarried March 4, 1900; that she deserted him within three months, and that thereafter continuously she lived and at the time of the death of decedent she was living, in adultery with James King and others whose names were unknown to appellee. There is a prayer that the title to the lands be quieted against all claims of appellant and that they be sold for purposes aforesaid.

At the request of the parties, the court found the facts specially, and stated conclusions of law thereon. The finding so far as material here is to the following effect: Decedent died intestate in Pike County, Indiana, October 9, 1912, leaving surviving him as his only heirs at law the appellant, his widow, and certain children of a former marriage, and also one child, the fruits of his marriage with appellant. At the time of his decease, he was the owner of the lands described in the petition. Appellant and decedent were married March 4, 1900, and lived together as husband and wife until May 27, 1900, when appellant separated herself from de-



cedent without cause, and ever thereafter lived apart from him. Appellant after the separation had born to her three children. The first was born December 18, 1900, and was a legitimate child of her marriage to decedent. The others were born June 5, 1907, and July 1, 1911, and were both illegitimate, but the evidence is silent as to their paternity. Appellant, after deserting her husband, lived about one year with her father and brother, and thereafter lived as a member of the family of James King, the husband of her twin sister. The appellant's reputation for chastity in the town and township in which she lived has been and is bad. Since about October, 1906, and up to and including October 9, 1912, appellant lived from time to time in the practice of adultery with persons whose names are not disclosed by the evidence.

The court stated a conclusion of law from the facts found that appellant by reason of her adulterous practice of living at the time of the death of decedent was not entitled to share in his estate. Judgment was rendered and decree entered on the conclusions of law that the entire tract of land be sold for the purpose of making assets to pay the debts of the estate, free from all claims of appellant as widow. Error is assigned on the foregoing conclusion of law, and also on the overruling of appellant's motion for a new trial. The only question presented under the latter assignment is respecting the sufficiency of the evidence to sustain the decision.

Considering the first assignment, there is a statutory provision that "If a husband die testate or intestate, leaving a widow, one-third of

1. his real estate shall descend to her in fee simple free from all demands of creditors."

§3014 Burns 1914, §2483 R. S. 1881. A further

statute applicable here is as follows: "If a wife shall have left her husband and shall be living at the time of his death in adultery, she shall take no part of the estate of her husband." §3034 Burns 1914, §2496 R. S. 1881. By virtue of §3014, *supra*, appellant, as surviving wife, at the decease of appellee's decedent, became the owner in fee simple of the undivided one-third of the lands involved in this proceeding, unless the facts proved and found by the court bring her within the condemnation of §3034, *supra*. In order that such a result may follow, it must appear that subsequent to the marriage she abandoned her husband, and also that at the time of his death she was living apart from him in adultery. *Wiseman v. Wiseman* (1880), 73 Ind. 112, 38 Am. Rep. 115.

It is specially found by the court that within less than three months after appellant and decedent were united in marriage, she separated

2. herself from him without cause, and that she ever thereafter lived separate and apart from him. As to the second element of §3034, *supra*, the finding is as follows: "That since about October, 1906, and up to and including the 9th day of October, 1912, the said Martha Spade has been living from time to time in the practice of adultery with parties whose names are not disclosed by the evidence."

A special finding should consist of ultimate facts and as a general rule evidentiary matter included therein will be disregarded. *Eckart v. Fort*

3. *Wayne, etc., Traction Co.* (1914), 181 Ind. 352, 104 N. E. 762; *Dinius v. Lahr* (1905), 36 Ind. App. 425, 74 N. E. 1033. Nothing can be added to a special finding by presumption, inference or intendment, and when a special finding is silent upon a material point, it is deemed to be found against the party upon whom rests the burden of

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proof. *Donaldson v. State, ex rel.* (1906), 167 Ind. 553, 78 N. E. 182; *Garretson v. Garretson* (1909), 40 Ind. App. 688, 88 N. E. 624. However, where the primary facts found lead to but one conclusion, there is no occasion for a statement of the ultimate fact. In such a case the ultimate fact will be considered as proven. But where from such primary facts stated in a special finding, a particular inference or its contradiction may be drawn with equal degrees of certainty or plausibility, and if the special finding is silent respecting the ultimate fact, it must be considered as unproven. *Mount v. Board, etc.* (1907), 168 Ind. 661, 80 N. E. 629, 14 L. R. A. (N. S.) 483; *Mayer v. C. P. Lesh Paper Co.* (1910), 45 Ind. App. 250, 89 N. E. 894, 90 N. E. 651.

Applying these general principles to the finding here, the ultimate fact which appellee was required to establish in order that he might

2. defeat appellant's right as surviving wife to participate in the division of his lands or the proceeds thereof, is that she was living in adultery at the time of her husband's death, she having theretofore separated herself from him. The finding is silent respecting such ultimate fact. We proceed to determine whether the finding contains its equivalent or other facts from which it results as a necessary inference. The finding that she "has been living from time to time in the practice of adultery" is equivalent to a finding that "she has been living from time to time in adultery." *Goodwin v. Owen* (1876), 55 Ind. 243, 249. The phrase "from time to time" is synonymous with "occasionally", "at intervals", "now and then". 20 Cyc 852. The finding then is to the effect that since October, 1906, up to and including October 9, 1912, appellant at intervals lived in adultery, or that occasionally she was guilty of adultery. This is practically equivalent to

a finding that between the dates named she occasionally lived in adultery. Assuming that from such a finding there might be deduced an inference that appellant was in the midst of such an interval at the time of her husband's death, yet it can not be said that the facts found compel such an inference. It is just as reasonable to conclude from such facts that while appellant now and then between the dates named was guilty of adultery, there may have been an absence of a continuous purpose and inclination to do wrong, and that previous to her husband's death appellant had reformed and that at that time she was living innocently. Conceding that the facts found are susceptible of different inferences, the one that appellant was living within the condemnation of the statute, the other that she was living virtuously, it was the province of the trial court rather than this court to deduce the ultimate inference.

This the trial court failed to do. It has been

4. held that a single act of adultery committed by the wife does not force the conclusion that she was living in adultery within the meaning of the statute at the subsequent time of her husband's death, but that the fact that she committed such act under circumstances showing a deep degree of abandonment, if proven, might, with  
2. other incriminating circumstances, be submitted to the jury to enable it to determine as to her course of life at the time of her husband's decease. *Gaylor v. McHenry* (1860), 15 Ind. 383. The case cited refers to *Armstrong v. State* (1836), 4 Blackf. 247, and *Winemiller v. State* (1858), 11 Ind. 516. In the former it is held that evidence of a single act of gambling in a designated room was admissible as tending to prove that such room was occupied for purposes of gambling, but that it was not conclusive to that end; that it was

for the jury to draw its own inferences from such fact proven, in the light of the attending circumstances. To the same effect is *Winemiller v. State, supra*. As some indication of the nature of the circumstances sufficient to compel an inference of a living in violation of §3034, *supra*, we call attention to the following: In *Goodwin v. Owen, supra*, a wife, after having been guilty of a number of acts of adultery, abandoned her husband, pursuant to an arrangement with her paramour, Miller, and went to a city where he met her and conducted her to a boarding house, and there installed her. At the time of her husband's death, she was not actually living with Miller, but was being maintained by him in such house where she was continuing her adulterous relations with him. It was held in effect that such facts force the conclusion that she was living in adultery at the time of her husband's death within the meaning of the statute. Likewise, the Kentucky court of appeals, in construing a similar statute, uses this language: "This statute does not mean that she shall constantly live with one man in adultery during her abandonment of the husband in order to forfeit her right of dower or distributable share; but if she admits any man or men to her periodically, or whenever it is convenient or opportunity is afforded, during said abandonment, such conduct constitutes a living in adultery within the meaning of the statute." *Goss v. Froman* (1889), 89 Ky. 318, 12 S. W. 387, 8 L. R. A. 102.

In our judgment, the statute here contemplates not only a relation wherein the wife after abandoning her husband is found at the time of his death domiciled with a man other than her husband in a state of adultery, but also a status wherein an inclination to adultery is a present element with the purpose and practice of fol-

lowing such inclination to its logical conclusion at convenience and whenever opportunity affords. If the wife is found so living at the decease of her husband, the statute is applicable. Such in effect is the holding in *Goodwin v. Owen, supra*, and *Goss v. Froman, supra*. The case at bar is different. The facts found here are not sufficient

2. to force a conclusion of continuity of inclination, purpose or practice, and are not radically inconsistent with an hypothesis that appellant had repented of her evil ways, and that she was living blamelessly at the time of her husband's death. The finding does not support the conclusion of law.

From a consideration of the evidence, it is possible to account somewhat for the uncertainty in the finding. Supplementing the abstract of

6. the finding as above set out, the court included therein the following primary facts, which fairly reflect the evidence: During the years when appellant was living as a member of the King family, she was employed at domestic work in the daytime at the Orphans' Home, near the King residence. With her earnings she clothed herself and children, and also contributed to the supply of the table. There was no evidence of any acts of intimacy between appellant and King, or of any mutual attachment between them, or that appellant kept company with any male person, or that she was out at night with any man or men, other than the inference drawn from the fact of the birth of her illegitimate children. King's wife was away from home but one night while appellant lived in the family, and during that night appellant's brother and sister were at the King home. The birth of the two illegitimate children, of course, establishes that appellant had been guilty of adultery. These events,

however, are conclusive merely that she made two sporadic excursions into the field of infidelity, rather than that she was living in adultery. The second illegitimate child was born July 1, 1911. It was, therefore, begotten about October 1, 1910. Appellee's decedent died October 9, 1912. Thus, relating to a period of two full years immediately preceding the death of her husband, there is not a particle of substantive evidence to show that she was guilty of any improper conduct. The evidence is therefore insufficient to sustain a finding or a decision of the court that she was living in adultery at the time of the death of her husband. In the

7. absence of evidence to the contrary, it is presumed that a woman is chaste and virtuous. *Robinson v. Powers* (1891), 129 Ind. 480, 28 N. E. 1112; *Gemmill v. Brown* (1900), 25 Ind. App. 6, 56 N. E. 691; 3 Ency. Evidence 54. It is true that where a woman is proven to have been unchaste or to have been guilty of specific acts of adultery at a certain time, a presumption of continuance to a subsequent time is, under some circumstances, indulged. It is only reasonable, however, that there be a limit to the application of this rule. If in a given case there is in fact such a continuance for a long period of time, it is reasonable that there will be some visible overt act, some open manifestation of the fact. Here for a period of two years, there is no evidence that appellant was guilty of a single act of indiscretion or of any lascivious conduct or of any suspicious actions, nor were there any incriminating circumstances, as that she met or associated with men at questionable times or places, or in the midst of improper surroundings, or that her associates were persons of bad repute. Divorce her from her past, and during the two years she environed herself with the *indicia* of chastity as far as the evidence



reveals. Under such circumstances, it is doing violence to mental processes to presume that she was living in adultery at the time of the decease of her husband. As bearing somewhat on the case, see the following: *Woodward v. Republic* (1896), 10 H. I. 416; *Smith v. Smith* (1834), 4 Paige Ch. (N. Y.) 432, 27 Am. Dec. 75; *People v. Clark* (1876), 33 Mich. 112; *People v. Squires* (1882), 49 Mich. 487, 13 N. W. 828; *People v. Jenness* (1858), 5 Mich. 305, 322; *Zeigler v. Mize* (1892), 132 Ind. 403, 31 N. E. 945.

At common law the adultery of the wife did not bar her right to dower. *Shaffer v. Richardson* (1866), 27 Ind. 112; 14 Cyc 83, 932.

2. There is a statute applicable to the adulterous husband (§3035 Burns 1914, §2497 R. S. 1881), identical in its provisions to §3034, *supra*. Doubtless the legislative purpose in the enactment of these statutes was to preclude the surviving unfaithful, immoral husband or wife from participating as a distributee in the estate of the deceased spouse, and thus to some extent to promote fidelity to the marital vows. The standard of conjugal unfaithfulness and immorality effective to that end, however, is prescribed by the statute. This standard respecting the wife is that she must have left her husband and be living in adultery at the time of his decease. Under the evidence, the facts here do not sink appellant to the level of the standard.

For errors indicated, the case must be reversed. Under the circumstances, however, it is probable that justice may be more clearly attained by a new trial. Judgment reversed, with instructions to sustain appellant's motion for a new trial.

NOTE.—Reported in 110 N. E. 1010. As to adultery in the absence of divorce as a bar to dower, see 5 Ann. Cas. 230. See, also, under (1, 4) 14 Cyc 84; (2) 14 Cyc 84; 20 Cyc 852; (3) 38 Cyc 1980, 1985; (7) 16 Cyc 1053, 1082.

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Terre Haute, etc., Traction Co. v. York—60 Ind. App. 399.

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TERRE HAUTE, INDIANAPOLIS AND EASTERN TRAC-  
TION COMPANY v. YORK.

[No. 8,900. Filed January 6, 1916.]

1. CARRIERS.—*Passenger Alighting from Street Car.—Duty of Employees.*—Employees in charge of a street car must use the highest degree of care consistent with the mode of conveyance and the transaction of the business, to see and know that no passenger is alighting before starting the car, but they are not required to know that no passenger is in the act of alighting before putting the car in motion. p. 400.
2. CARRIERS.—*Passenger Alighting from Street Car.—Evidence.—Instructions.*—In a passenger's action for injuries sustained in alighting from a street car, the conductor's testimony that he saw plaintiff attempting to alight, that she stepped off before the car stopped, and that the car ran eight or ten feet after she stepped off, was not susceptible to the inference that the conductor saw plaintiff getting off the car after it had stopped, and in view of such evidence the error in an instruction, stating that employees in charge of street cars must know that no passenger is in the act of alighting before again putting the car in motion, can not be regarded as harmless. p. 401.
3. CARRIERS.—*Carriage of Passengers.—Street Cars.—Stopping Car on Signal.—Invitation to Passenger to Alight.—Instructions.*—An instruction to the jury that the stopping of a street car, at or near a regular stopping place, after a signal provided by the carrier to notify the agents in charge of the car that a passenger desires to alight at the next stop has been given or caused to be given by a passenger on such car, is an invitation to such passenger to alight and such passenger has a right to alight the instant such car stops, and to rely on such car not being started until a reasonable time for such passenger to alight has been given, was a correct general statement of what a passenger may understand from a stop at or near a regular stopping place after a signal has been given, since if the stop is for a purpose other than permitting the passenger to alight it would be the duty of those in charge to use measures to prevent passengers from alighting. p. 402.

From Parke Circuit Court; *Barton S. Aikman*, Judge.

Action by Emma J. York against the Terre Haute, Indianapolis and Eastern Traction Company. From a judgment for plaintiff, the defendant appeals. *Reversed.*

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Terre Haute, etc., Traction Co. v. York—60 Ind. App. 399.

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*McNutt, Wallace & Sanders* and *Maxwell & McFaddin*, for appellant.

*Hamill, Hickey & Evans* and *Jacob S. White*, for appellee.

IBACH, C. J.—This was an action for damages for personal injuries alleged to have been caused by the negligence of appellant's servants operating one of its cars in the city of Terre Haute, in starting a car while appellee was alighting therefrom, and throwing her to the ground. Appellee recovered a verdict for \$1,975 damages.

The errors assigned for reversal all arise on the overruling of appellant's motion for new trial.

One error assigned is the giving of instruc-

1. tion No. 15, at the request of appellee, as follows: "The law requires that employes of street railways, in charge of conveyances used for the transportation of passengers, to do more than to stop the cars reasonably long enough for passengers to alight safely from such cars. They must use the highest degree of care consistent with the mode of conveyance and the transaction of the business of such street railway, and know that no passenger is in the act of alighting from the car before putting it in motion again. If such employes fail in that respect, then such failure is imputed to the employer, and is actionable negligence on the part of the employer, and it is no excuse to show that the car on the particular occasion was operated in the usual manner." This instruction was erroneous in stating that employes in charge of street cars must know that no passenger is in the act of alighting from a car before putting it in motion again. What the law requires is the use of the highest degree of care consistent with the mode of conveyance and the transaction of the business, to see and know that no

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Terre Haute, etc., Traction Co. v. York—60 Ind. App. 399.

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passenger is alighting before starting the car, and the employes of the company are not held to the absolute duty laid down in the instruction. The Supreme Court and this court have several times considered instructions similar to this one, and held that their giving constituted reversible error. *Louisville, etc., Traction Co. v. Korbe* (1911), 175 Ind. 450, 93 N. E. 5, 94 N. E. 768; *Caughill v. Indianapolis Traction, etc., Co.* (1912), 50 Ind. App. 5, 97 N. E. 1028; *Indiana Union Traction Co. v. Bales* (1915), 58 Ind. App. 92, 107 N. E. 682.

Appellee's counsel contend that if erroneous, the instruction could do no harm, in this case, for they take the view that the evidence shows

2. that the conductor knew appellee was getting off the car when he started it. The conductor testified that he saw appellee attempting to alight, and that she stepped off before the car stopped, and the car ran eight or ten feet after she stepped off. This was the only evidence to the effect that he saw her when she alighted. The conductor's evidence, taken as a whole, disclosed an entirely different state of facts from that averred in the complaint, and to which the instruction was intended to apply. He testified that he saw appellee step off the car before it stopped. In order to hold the instruction harmless, we would have to say that, as a matter of law, the inference from the conductor's evidence is, that he saw appellee getting off the car after it stopped. We believe that this court in considering the evidence of the conductor must take it as a whole, and so taken, the inference contended for by appellee is not the natural inference therefrom. It does not appear that the error in giving instruction No. 15 was rendered harmless, and for its giving the judgment must be reversed.

Complaint is also made of instruction No. 16 in the following words: "The stopping of a street car, at or near a regular stopping place, operated  
3. by a carrier of passengers for hire, after a signal, provided by such carrier, to notify the agents in charge of such car that a passenger desires to alight at the next stop, has been given, or caused to be given by a passenger on such car, is an invitation to such passenger to alight and such passenger has a right to alight the instant such car stops, and to rely on such car not being started until a reasonable time for such passenger to alight has been given." It is objected that after a signal to stop has been given, circumstances may arise which would cause the motorman to stop the car near a regular stopping place, but not for the purpose of allowing the passenger to alight. However, we believe that the instruction is a correct general statement of what a passenger may understand from a stop at or near a regular stopping place, after a signal has been given, and that generally speaking, such a stop is an invitation to the passenger to alight, and that as street cars are of necessity operated with some despatch, it is an invitation to the passenger to alight instantly. If after a signal has been given, a stop near to the regular stopping place is made for some purpose other than to allow the passenger to alight, the duty would then be on the servants of the company in charge of the car to use measures to prevent passengers from then alighting. It is well known that street cars do not always stop at exactly the same spot, in reference to a regular stopping place. There may be conceivable cases in which an instruction in the terms of No. 16 would be inapplicable, but under the pleadings and evidence in this case, its giving was not error.

It is also contended that the court erred in the ad-

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mission of certain evidence, for the reason that it was beyond the issues presented by the pleadings, but on new trial the appellee may easily amend her pleadings to make such evidence admissible, therefore we will not consider whether it was admissible under the pleadings in their present state. Judgment reversed, and cause remanded for new trial.

NOTE.—Reported in 110 N. E. 999. As to duties of employes of carriers of passengers on starting and stopping, see 7 Am. St. 832. As to duty to see that passenger has alighted before starting train at station, see 25 L. R. A. (N. S.) 217. As to duty of street car conductor to see that passenger is off before starting the car, see 11 L. R. A. (N. S.) 140. See, also, under (1, 3) 6 Cyc 616.

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### MELDON v. COX.

[No. 8,923. Filed January 6, 1916.]

1. **NEW TRIAL.—Independent Action.—Complaint.**—A complaint for a new trial under §589 Burns 1914, §572 R. S. 1881, is an action independent of the original action in which the judgment was rendered, and must stand or fall on its own merits, as a cause of action. p. 405.
2. **NEW TRIAL.—Independent Action.—Newly Discovered Evidence.**—To sustain an independent action for a new trial under §589 Burns 1914, §572 R. S. 1881, on the ground of newly discovered evidence, it must appear that such evidence is not merely cumulative and that it would probably change the result if a new trial were granted, and it must also be shown that it was discovered subsequent to the term at which the original trial was had and that it could not have been discovered before the trial by the exercise of due diligence. pp. 405, 406.
3. **NEW TRIAL.—Independent Action.—Procedure.**—Upon the joinder of issues in an independent action for new trial under §589 Burns 1914, §572 R. S. 1881, on the ground of newly discovered evidence, plaintiff should introduce in evidence the record of the original trial, prove what the evidence was upon such trial, and make proof of the newly discovered evidence together with a showing that it was discovered since the term at which the cause was originally tried and that due diligence was used to discover the same before the original trial; and the defendant should in like manner introduce his evidence before the court. p. 405.
4. **NEW TRIAL.—Independent Action.—Appeal.**—Where a new trial on the ground of newly discovered evidence is refused in an inde-

pendent action brought under §589 Burns 1914, §572 R. S. 1881, the applicant, if relying on the evidence in an appeal, should make the evidence a part of the record by a proper bill of exceptions. p. 406.

5. **NEW TRIAL.—Independent Action.—Review.**—Where, in an independent action under §589 Burns 1914, §572 R. S. 1881, for a new trial on the ground of newly discovered evidence, the method adopted by the applicant for presenting the oral evidence heard at the original trial was by asking the official reporter only as to what was said concerning the salient fact upon which the action turned, and from his testimony and from the evidence generally it appeared that the issue was clouded with uncertainty, it was for the trial court to conclude whether the alleged newly discovered evidence was such as to warrant the granting of a new trial, and its judgment was conclusive. p. 407.

From Tipton Circuit Court; *James M. Purvis*, Judge.

Action by Teresa M. Meldon against Elias Cox. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

*Leonard J. Curtis and Gifford & Gifford*, for appellant.

*Edward Daniels and Sheridan & Gruber*, for appellee.

MORAN, J.—This was an action by appellant for a new trial as against appellee by virtue of §589 Burns 1914, §563 R. S. 1881, which provides among other things that where causes for a new trial are discovered, after the term at which the verdict or decision was rendered, the application may be made by a complaint filed with the clerk not later than the second term after the discovery, nor more than one year after the rendition of the final judgment, requiring the adverse party to appear in response to a summons issued, and that the cause be summarily decided by the court upon the evidence. Upon issues being joined and a trial had, appellant was denied the relief sought and judgment was rendered against her for costs. From this judgment an appeal has been



taken, the correctness of which appellant seeks to review upon error assigned on the overruling of her motion for a new trial.

Under the causes for a new trial that the decision is not sustained by sufficient evidence and is contrary to law, the court's attention is directed by appellant solely to the evidence which, she urges, established the allegations of her complaint and entitled her to another trial of the original cause in the court below. A complaint for a new trial is an

1. action independent of the original action, in which the judgment was rendered and must stand or fall on its own merits as a cause of action. *Jones v. Kolman* (1912), 50 Ind. App. 158, 98 N. E. 74; *Davis v. Davis* (1896), 145 Ind. 4, 43 N. E. 935. Before appellant is entitled to a new trial, it must appear that the newly-discovered evidence is

2. such as would probably change the result if a new trial was granted and it must have been discovered subsequent to the trial and be such as could not have been discovered before the trial by the exercise of due diligence and must be material to the issues and not merely cumulative to the evidence offered on the original trial. *People v. Williams* (1909), 242 Ill. 197, 17 Ann. Cas. 313; *Bronson v. Hickman* (1857), 10 Ind. 3; *Fleming v. McClafin* (1891), 1 Ind. App. 537, 27 N. E. 875; *Westbrook v. Aultman, Miller & Co.* (1891), 3 Ind. App. 83, 28 N. E. 1011.

The practice in an action to which the cause at bar belongs in this State is upon issues being joined, the plaintiff should introduce in evidence the

3. record of the former trial, prove what the evidence was upon such trial, the newly-discovered evidence, and show that it has been discovered since the term when the cause was formerly tried, and the diligence used to discover before the

former trial; and the defendant should in like  
4. manner introduce his evidence before the court, and if the new trial is refused the party appealing to the upper court should when the evidence is relied upon put into the record by a proper bill of exceptions the evidence in the cause. *Kitch v. Oatis* (1881), 79 Ind. 96; *Sanders v. Loy* (1873), 45 Ind. 229.

As to the character of evidence that entitles one to a new trial in this class of cases, Elliott, J., in *Hines v. Driver* (1885), 100 Ind. 315, said: "The

2. authorities go very far in requiring that the newly discovered evidence must be of a material character; some of them, indeed, go to the length of requiring that it must be such as to make it conclusively appear that if given it would change the result; but this is, perhaps, an extreme view. It is, however, very firmly settled that the evidence must be of a decisive character, and be such as to make it clearly and fully appear that it would produce a different result." And in the more recent case of *Davis v. Davis* (1896), 145 Ind. 4, 43 N. E. 935, it was said: "The rule is established beyond controversy that applications for a new trial for newly-discovered evidence are viewed with disfavor by the courts. They should be received with great caution, for the reason that there are few causes tried in which something may not be hunted up after the trial, and it extends great temptation to the commission of perjury to admit new evidence after the party who has lost a verdict has had an opportunity of discovering his adversary's strength and his own weakness. The law favors the diligent. A party, therefore, seeking a new trial on account of newly-discovered evidence must, if he would succeed, establish every element of his case strongly, clearly, and satisfactorily, both by allegation and proof."

The contention of appellant is that one John D. Barton, who was the agent of appellant, loaned to appellee for appellant at one time \$400.75,

5. and as evidence thereof, a note for this amount was executed by appellee, together with a chattel mortgage on certain property securing the same, and that at the former trial, appellee denied receiving any money or thing of value in consideration of the execution of the note, considering it as a part of another transaction and loan. That by the newly-discovered evidence, it was disclosed by one George W. Oliver that he had knowledge of circumstances which established the facts as contended for by appellant. A brief summary of the evidence of George W. Oliver discloses that on December 2, 1911, while in close proximity to the office of John D. Barton, who was the agent of appellant, appellee called at the office and that Barton was not in, and that in a conversation with Oliver, appellee informed him that he was in need of \$350, and asked Oliver whether Barton was in the habit of loaning that amount of money on chattel security. On the return of Barton to his office, Oliver informed him of appellee's desire in the matter. That appellee returned soon after and in a second conversation, Oliver requested appellee to let him know as soon as possible whether he could get the money through Barton and if not he thought he could obtain it for him. Later he learned from appellee that he received the money from Barton.

The salient fact upon which the action turned according to appellant is that appellee denied receiving the loan of \$400.75 from appellant, and that the newly-discovered evidence disclosed that he stated to Oliver that he did receive the same. Anna Barton, the wife of appellant's agent, testified at the former trial that she

turned over to appellee the sum of \$355 on a note calling for \$400.75, the remaining portion of the note covering commission and expenses. The record in this case by the oral evidence discloses that at the former trial appellee testified that he received from J. D. Barton the sum of \$50 and \$85. When and where he received the same is not shown, nor does the alleged newly-discovered evidence on the part of Oliver disclose the amount of money that appellee said he received from Barton. The language of Oliver is, "I met him as he came down the stairs from Mr. Barton's office and I asked him if he got the money from Barton, and he said he did."

The method adopted of getting the oral evidence of the former trial before the trial court was through the official reporter, who reported the cause. His attention was directed only to what was said in reference to the money being received by appellee from Barton. At the close of the examination of the court reporter, he stated that he did not remember any other evidence given at the former trial in reference to the payment of money other than detailed by him; and from his testimony and from the evidence generally, there is such an uncertainty that it was clearly within the province of the trial court to conclude whether the evidence counted upon as being newly-discovered was such in fact or merely cumulative, or as to whether it would be likely to change the result, if a new trial was granted. Appellee insisted throughout the introduction of the oral evidence, as now, that the proper method was not employed to get the evidence of the former trial before the court, and further that the condition of the record precludes any inquiry into the result reached by the trial court. The conclusion we have reached makes it unnecessary to pass upon this

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question. There is no reversible error in the record. Judgment affirmed.

NOTE.—Reported in 110 N. E. 1008. See, also, under (1) 29 Cyc 960, 961; (2) 29 Cyc 883, 963; (3) 29 Cyc 964; (4) 3 Cyc 175; (5) 29 Cyc 1030.

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THE PITTSBURGH, CINCINNATI, CHICAGO AND ST.  
LOUIS RAILWAY COMPANY v. LAMM.

[No. 8,824. Filed January 7, 1916.]

1. **APPEAL.**—*Proceedings in Trial Court Pending Appeal.*—*Application for Nunc Pro Tunc Entry.*—*Denial of Relief.*—*Presenting Question for Review.*—Where, after the appeal from a judgment had been perfected and briefs filed, appellant petitioned the trial court for a *nunc pro tunc* entry of the filing of instructions, the relief sought was auxiliary to the cause pending on appeal, and the dismissal of the petition was properly brought before the court on appeal by proceeding by *certiorari* rather than by an independent appeal. p. 411.
2. **APPEAL.**—*Presenting Questions for Review.*—*Refusal of Nunc Pro Tunc Entry.*—A motion for a new trial is not requisite in order to have a review of the action of the trial court on an application for an entry *nunc pro tunc*, but exceptions should be properly reserved and the ruling should be assigned as error. p. 411.
3. **APPEAL.**—*Assignment of Errors.*—*Amendment.*—Leave to amend the assignment of errors may be granted for the purpose of presenting for review the striking out of a petition for a *nunc pro tunc* entry filed in the trial court after the appeal was perfected and briefs filed. p. 411.

From Miami Circuit Court; *Joseph N. Tillett*, Judge.

Action by Willis C. Lamm against The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company. From a judgment for plaintiff, the defendant appeals, and asks leave to amend the assignment of errors to present for review the ruling on a motion for a *nunc pro tunc* entry filed subsequent to the perfection of the appeal. *Leave to amend granted.*

*G. E. Ross*, for appellant.

*Cole & Cole*, for appellee.

CALDWELL, J.—This cause is before the court on appellant's petition to make additional assignment of error. The prior history of the proceeding is as follows: The cause was tried below and a verdict rendered in appellee's favor May 7, 1913, being at the April term, 1913, of the trial court. Judgment was rendered on the verdict from which an appeal was taken to this court, which appeal is now pending. At the November term, 1915, of the trial court, being after the transcript on appeal and appellant's and appellee's briefs were filed in this court, appellant petitioned the trial court for an entry *nunc pro tunc* to show that all instructions given and refused were filed and made part of the record in the trial court. The petition recited an entry to the effect that all instructions given and refused were by the trial court ordered filed. On the basis of an entry in the judge's bench docket and a file mark alleged to appear on the instructions, appellant asked as relief that an entry be made *nunc pro tunc*, showing that the instructions were actually filed by order of court. Appellee appeared to the petition in the trial court and resisted the granting of the relief thereby sought, and to that end moved that the petition be dismissed. At a hearing, at which the evidence was exclusively documentary and matter of record, the court sustained appellee's motion to dismiss the petition, and denied the relief thereby sought. Appellant reserved an exception to the action and ruling of the court, and preserved the exception by filing a bill. Thereupon, on appellant's application, this court on November 19, 1915, issued a writ of *certiorari*, directed to the clerk of the trial court commanding him to certify to this court a transcript of the proceedings had on appellant's petition, in return to which writ such a transcript has been filed, and is now before this

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court. Appellant now applies to this court for permission to assign additional error to the effect that the trial court erred in refusing to correct the record as prayed and in sustaining appellee's motion to strike out appellant's petition for an entry *nunc pro tunc* to that end.

As indicated, the main action is pending in this court on appeal. The relief which appellant

1. sought through its petition for an entry *nunc pro tunc* was not an end in and of itself, but rather as auxilliary to and for the bearing which it might have in this court, if granted, on the cause pending on appeal. Appellant, therefore, properly caused the proceedings had on its said petition to be brought before this court by proceeding by *certiorari*, rather than by independent appeal. *Harris v. Tomlinson* (1892), 130 Ind. 426, 30 N. E. 214; *Aetna Life Ins. Co. v. Sellers* (1900), 154 Ind. 374, 56 N. E. 98; *Hamilton v. Burch* (1867), 28 Ind. 233, 239; *McMahan v. Works* (1880), 72 Ind. 19; *Hannah v. Dorrell* (1881), 73 Ind. 465, 471; *Driver v. Driver* (1899), 153 Ind. 88, 54 N. E. 389; *Berkey v. Rensberger* (1912), 49 Ind. App. 226, 96 N. E. 32; *Ross v. Stockwell* (1897), 17 Ind. App. 77, 46 N. E. 360; Elliott, App. Proc. §207; Ewbanks' Manual (2d ed.) §214b.

In order that the action of the trial court on an application for an entry *nunc pro tunc* may be reviewed, no motion for a new trial is necessary.

2. *Harris v. Tomlinson, supra; Runnels v. Kaylor* (1884), 95 Ind. 503; Elliott, App. Proc. §214. However, as an assignment of error is the complaint in an appellate tribunal, it would seem that the complaining party, having prop-

3. erly reserved an exception, should assign error in order that such action may be reviewed. Such is the holding expressly, or by im-



plication, in the following: *Rayle v. Indianapolis, etc., R. Co.* (1872), 40 Ind. 347; *Hannah v. Dorrell, supra*; *Williams v. Henderson* (1883), 90 Ind. 577; *Walker v. State* (1885), 102 Ind. 502, 514, 1 N.E. 856. In granting appellant permission to assign additional error as indicated, no opinion is expressed respecting the merits of the question thereby presented. It is therefore ordered that appellant be permitted to assign additional error as prayed, by a writing on or attached to the transcript, and that it be charged with the costs and expenses of making amendments in appellee's brief, if any should be made necessary or expedient in order to meet the situation presented.

NOTE.—Reported in 110 N. E. 997. See, also, under (1) 3 Cyc 149; (2) 3 C. J. 945, 984, 1334; 2 Cyc 732; (3) 3 C. J. 1399; 2 Cyc 1005.

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### KING-CROWTHER CORPORATION v. ASHCRAFT.

[No. 8,782. Filed January 7, 1916.]

1. NUISANCE.—*Complaint.—Notice.—Demand.*—A complaint which, when considered as a whole, clearly proceeded on the theory that defendant by the acts complained of knowingly created a nuisance on plaintiff's land to her damage, and contained all the averments necessary to make it sufficient on that theory, was not objectionable for failure to aver notice or demand for the abatement of the nuisance, or because some of the averments tended to obscure rather than elucidate its theory. p. 413.
2. NUISANCE.—*Action.—Necessity for Notice or Demand for Abatement.*—Where a nuisance was created by defendant in collecting oil and salt water from its wells and emptying same on plaintiff's land, no notice or demand on it for abatement of the nuisance was necessary as a condition precedent to an action for damages. p. 414.
3. APPEAL.—*Record.—Bill of Exceptions.—Questions Reviewable.*—Under §661 Burns 1914, Acts 1911 p. 193, application for reëxtension of the time for filing a bill of exceptions shall be made on the day prior to the day the time first given expires, and there is no other authority by which a reëxtension of time beyond the term may be granted; hence an application made on the day on which the time first given expired came too late, and though granted, did

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not operate to make the bill of exceptions thereafter filed a part of the record, and consequently no question arising on the evidence was presented. p. 415.

From Randolph Circuit Court; *James S. Engle*, Judge.

Action by Hettie C. Ashcraft against the King Crowther Corporation. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

*Orr & Orr*, for appellant.

*W. A. Thompson* and *R. W. Sprague*, for appellee.

HOTTEL, J.—This is an appeal from a judgment of \$500 recovered by appellee against appellant in an action brought by appellee for damages to her real estate which she alleged was caused by salt water and other deleterious refuse from oil wells which appellant and others permitted and caused to flow and collect over and upon said real estate. The errors assigned in this court and relied on for reversal challenge the action of the trial court in overruling the demurrer to the complaint and in overruling the motion for new trial.

It is claimed by appellant in effect that the complaint proceeds on no definite theory; that some of its averments would indicate that the pleader

1. was attempting to charge appellant and others with negligently doing and permitting acts which resulted in the injury to her real estate while other averments indicate that the pleader proceeded on "the theory that defendants were liable because the acts complained of constituted a private nuisance"; that judged upon either theory the complaint is insufficient; that it is insufficient on the theory of negligence because it contains no averment that plaintiff was free from negligence contributing to the damage alleged to have been suffered to her land, and also for failure to show that ap-

appellee could not have protected her property by the exercise of ordinary care; that it is insufficient on the theory of maintaining a nuisance, because it shows that such nuisance was not originally created, but only continued, by appellant, and fails to aver any notice or demand upon appellant to abate the same. It may be true that some of the averments of the complaint tend to obscure rather than elucidate its theory, but when read in its entirety we think it clear that it proceeds on the theory that appellant and others by the acts complained of knowingly *created* a nuisance on appellee's land to her damage. The complaint contains all the averments necessary to make it sufficient on such theory. Where a party creates or causes a nuisance to the injury of another, a notice or demand to abate such nuisance is not necessary to entitle the injured party to bring his action for damages. *City of Valparaiso v. Bozarth* (1899), 153 Ind. 536, 538, 55 N. E. 439, 47 L. R. A. 487, and cases cited.

The nuisance complained of in this case was not in maintaining the gas or oil wells, but in collecting the oil and salt water from such wells and empty-  
2. ing the same upon the lands of appellee to her damage. This was done by appellant after it became the owner of the oil leases involved and hence after that time it created and caused the nuisance complained of and, under the cases, *supra*, no notice or demand on it to abate such nuisance was necessary.

The other objections to the complaint are fully disposed of by the case of *Niagara Oil Co. v. Jackson* (1911), 48 Ind. App. 238, 91 N. E. 825, where a very similar complaint was considered and held sufficient against the same or similar objections. See, also, *Niagara Oil Co. v. Ogle* (1912), 177 Ind. 292, 294, 98 N. E. 60, 42 L. R. A. (N. S.) 714,

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Ann. Cas. 1914 D 67; *Ohio Oil Co. v. Westfe* (1909), 43 Ind. App. 661, 663, 88 N. E. 354; *Munc Pulp Co. v. Martin* (1899), 23 Ind. App. 558, 56 55 N. E. 796; *Rock Oil Co. v. Brumbaugh* (1915), 1 Ind. App. 640, 108 N. E. 260. No error was committed by the trial court in its ruling on the demurrer to the complaint.

A consideration of the questions raised by appellant's motion for a new trial would require an examination and consideration of the evidence.

3. The bill of exceptions containing the evidence is not properly in the record. The record shows that appellant's motion for new trial was overruled on October 18, 1912, and appellant was given sixty days in which to file all bills of exceptions. The record further shows that on December 17, 1912 (being the last day of the time first given appellant filed its bill of exceptions number one and on the same day filed and presented its unverified petition for sixty days' extension of time within which to prepare and file its bill of exceptions containing the evidence. Such request was accompanied by a proper affidavit of the court reporter, showing that the transcript could not be completed in the time first given and that six days additional would be necessary to complete the same. Immediately following such affidavit there is an unsigned entry as follows: "Ordered that time for filing bill of exceptions be extended for eight days from this date." On March 7, 1913, and within said *eighty* days, appellant filed its bill of exceptions containing the evidence. Section 661 Burns 1914, Acts 1911 p. 193 furnishes the only authority under which a reextension of time beyond the term may be granted. Its provisions were not complied with in this case. It provides, among other things, that application for reextension of time shall

be made on the day prior to the day the time first given expires. The time "first given" expired on December 17, 1912, and as the record shows that the request for reëxtension of time was not made until that day it was not in time. *English v. English* (1915), 182 Ind. 675, 107 N. E. 547. The failure to comply with such provision of the statute is alone sufficient to render the order granting such reëxtension without force. It follows that the bill of exceptions containing the evidence is not in the record and hence no question depending on the evidence can be considered. There being no available error presented by the record the judgment below is affirmed.

Caldwell, J., not participating.

NOTE.—Reported in 110 N. E. 998. As to liability for nuisance, see 118 Am. St. 872. As to the liability of a mine or well owner for injury caused by water, oil, or the like, flowing onto adjoining land, see Ann. Cas. 1914 D 70. See, also, under (1) 29 Cyc 1263; (2) 29 Cyc 1255; (3) 3 Cyc 1916 Ann. 46.

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NASHVILLE, CHATTANOOGA AND ST. LOUIS RAILWAY  
COMPANY v. JOHNSON.

[No. 8,320. Filed October 8, 1914. Mandate modified December 15, 1914. Rehearing denied October 15, 1915. Transfer denied January 7, 1916.]

1. CARRIERS.—*Carriage of Live Stock.—Negligence.—Pleading.*—In an action by a railroad company to recover freight charges for the transportation of a car of horses, an answer alleging that plaintiff in consideration of a promise to pay the sum claimed received the car of horses from defendant and undertook and agreed to carry them safely, that plaintiff negligently failed in the performance of the undertaking in that it negligently crowded the horses into a car too small in capacity, and negligently failed to supply them with bedding, whereby and by reason of which they were injured, etc., was not open to the objection that the injury was not traced to the negligence charged by any proper averments. p. 420.
2. CARRIERS.—*Carriage of Live Stock.—Negligence.—Pleading.*—In an action by a railroad company to recover freight charges for the transportation of a car of horses, defendant's counterclaim for

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damages, alleging delivery to an initial carrier who received and loaded the horses into the car and undertook to deliver them safely at the place to which they were consigned, that said horses were transported and delivered by the initial carrier to another carrier who received and reloaded them and undertook to deliver them safely to the end of its line, and that the latter carrier delivered them to plaintiff who received them and undertook to carry and deliver them safely to defendant at the place to which they were consigned, and charging plaintiff and each of the carriers with negligence in loading the horses into a car of insufficient capacity, in failing to supply them with bedding, and in operating the car in a violent manner, whereby some of the horses were killed and others injured, to defendant's damage, was not open to the objection that it did not charge plaintiff with negligence in loading or transporting the horses. p. 421.

3. **APPEAL.—Review.—Harmless Error.—Ruling on Demurrers.**—Error, if any, in sustaining a demurrer to a paragraph of reply, and the demurrer to plaintiff's answer to defendant's counterclaim, was harmless, where the facts pleaded were in each case provable under the general denial. p. 422.

4. **CARRIERS.—Carriage of Live Stock.—Action.—Issues.—Instructions.**—In an action by a railroad company, which was the terminal carrier, to recover on a check given to it for the freight charges due on a shipment of horses, where defendant answered on the theory that plaintiff to the exclusion of the initial and connecting carriers negligently injured the horses in transporting them, whereby defendant suffered damages in excess of the amount of the check, an instruction stating that if defendant proved by a fair preponderance of the evidence "that the plaintiff or its connecting lines injured or damaged his horses more than the amount of such check", etc., was erroneous in that it predicated a defense in part on an injury that may have been inflicted by the other carriers, but the error was harmless in view of the fact that the evidence showed without contradiction that the horses were injured while in plaintiff's possession. pp. 423, 425.

5. **CARRIERS.—Carriage of Live Stock.—Connecting Carriers.—Negligence.—Presumptions.**—Where freight, including live stock, is received by the initial carrier in good condition, and is delivered by the terminal carrier in a damaged condition, the latter has the burden of showing that the freight was not injured while in its possession, and in the absence of such showing it will be presumed that the injury occurred on the line of the terminal carrier. p. 424.

6. **CARRIERS.—Carriage of Live Stock.—Connecting Carriers.—Negligence.—Liability of Terminal Carrier.**—Where live stock was taken from the car of the initial carrier and reloaded into a car of insufficient capacity by the connecting carrier, who delivered the

car without change in its condition to the terminal carrier, the latter by accepting the car and undertaking to transport the horses therein made such instrumentality its own, and could not avoid liability for injuries resulting from the condition of the car and not shown to have occurred on the line of the connecting carrier. p. 427.

7. APPEAL.—*Review.*—*Harmless Error.*—*Instructions.*—Error in instructions which predicated liability against a terminal carrier for damage to a shipment of horses in part on injuries that may have been inflicted by the initial or connecting carriers, was harmless in view of evidence showing without contradiction that the horses were injured while in possession of the terminal carrier. p. 428.

8 CARRIERS.—*Carriage of Live Stock.*—*Negligence.*—*Liability.*—*Instructions.*—Barring certain exceptions resulting from an act of God, or of the public enemy, or arising from the negligence of the shipper or from the inherent nature of the goods shipped, the common-law liability of a carrier makes it an insurer of the safety of a shipment intrusted to it, in the absence of a contract limiting its liability; hence, in a carrier's action for freight charges due on a car of horses, where defendant filed a counterclaim declaring on plaintiff's common-law liability for damages by reason of injury to the horses in transportation, and there was nothing to show the application of any exception to the rule, an instruction that railroad companies are liable as common carriers and are insurers of the safe delivery of property entrusted to them for transportation and that they will not be excused for failure to make a safe delivery, was not erroneous. (*Cleveland, etc., R. Co. v. Rudy* [1909], 173 Ind. 181, distinguished.) pp. 428, 430.

9. CARRIERS.—*Carriage of Freight.*—*Exemption from Common-Law Liability.*—*Burden of Proof.*—Where the property carried was committed exclusively to the carrier, and the carrier's common-law liability is relied on for injury thereto, the carrier has the burden of alleging and proving that the shipment was within an exception to such rule of liability. p. 430.

10. APPEAL.—*Review.*—*Misconduct.*—*Surprise.*—*Variance.*—In an action by a terminal carrier to recover freight charges on a car of horses, where defendant filed a counterclaim for damages counting on plaintiff's common-law liability, and in which no reference was made to any special contract of shipment, the statement of defendant in response to a question from his counsel on cross-examination that the initial carrier gave him a way-bill or shipping contract, that the shipment was billed through to final destination, and that the way-bill or contract was at his home, did not constitute either misconduct, surprise, or variance that would entitle plaintiff to a new trial, in view of the fact that no such contract was introduced or offered in evidence, and that there was nothing to show that plaintiff was a party to such contract or in any way entitled to the benefit of any of its provisions. p. 431.



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11. **CARRIERS.—Carriage of Live Stock.—Injuries.—Damages.**—In an action by a railroad company to recover freight charges for the transportation of a car of horses, in which defendant filed a counterclaim in two paragraphs, in the first praying damages in the sum of \$1,200, and in the second declaring on the same transaction and alleging damages in the sum of \$1,500 by reason of the injuries alleged and in the sum of \$100 for expense in an effort to cure the horses, with prayer for judgment in the sum of \$1,400, the amount that defendant could recover must be judged from the facts pleaded rather than from the prayer, so that, there being no evidence to sustain the alleged item of expenditure in an effort to cure the horses, the limit of recovery on such counterclaim was \$1,500, less the sum of \$433.20 which the uncontradicted evidence showed plaintiff entitled to recover; hence a verdict awarding defendant \$1,200 was excessive. p. 432.
12. **APPEAL. — Review. — Evidence. — Verdict.** — Where defendant's counterclaim proceeded on the theory of damages to his horses while being transported by the plaintiff railroad company, and the evidence was directed to that end, without any evidence on the subject of damages to any other horses, the verdict is not open to the objection that it includes damages for the loss of two other horses. p. 434.
13. **APPEAL.—Briefs on Petition for Rehearing.—Consideration.**—Extracts of testimony set out in appellant's brief on petition for a rehearing, not set out or referred to in appellant's original brief, will not be considered. p. 434.

From Johnson Circuit Court; *William E. Deupree*, Judge.

Action by the Nashville, Chattanooga and St. Louis Railway Company against Anthony Johnson. From the judgment rendered, the plaintiff appeals. *Affirmed.*

*William Featherngill*, for appellant.

*R. M. Miller, H. C. Barnett* and *Oral S. Barnett*, for appellee.

**CALDWELL, J.**—This action grew out of the shipment of a carload of horses by appellee from Collins, Montana, to Lebanon, Tennessee, over the respective lines of an initial, a connecting and a terminal carrier, appellant, whose line extends from Nashville to Lebanon, Tennessee, being such terminal car-

rier. On the arrival of the horses at Lebanon, appellee issued to appellant's agent, for freight charges on the carload of horses, a check, dated November 3, 1909, drawn on the Franklin National Bank of Franklin, Indiana, in the sum of \$382.13. Soon after the execution of the check, appellee notified the bank not to pay it, whereby, on presentation, it went to protest for nonpayment.

Appellant's complaint is in two paragraphs. The first declares on the check and interest thereon, and protest expenses in the sum of \$2.80; and the second paragraph declares on an account stated in the amount of the check. In addition to a general denial, appellee filed three paragraphs of special answer, numbered two, three and four, and two paragraphs of counterclaim numbered five and six. The action of the court in overruling the demurrer to each paragraph of special answer and each paragraph of counterclaim is properly presented. Paragraphs two and three are directed to the first paragraph of complaint. The second paragraph is a general answer of no consideration for the execution of the check; while by the third, the facts constituting the nonexistence of such consideration are more specifically pleaded. Each of said paragraphs is sufficient. The fourth paragraph of an-

1. swer, which is directed to both paragraphs of the complaint alleges in substance that appellant, as a common carrier for hire, in consideration of the promise to pay the sum set out in said check, and involved in the account, received from appellee the carload of horses at St. Louis, Missouri, and undertook and agreed to carry them safely to Lebanon, Tennessee; that appellant negligently failed in the performance of the undertaking, in that appellant negligently crowded the horses into a car too small in capacity,

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and negligently failed to supply them with bedding, whereby and by reason of which, the horses were injured as alleged in said paragraph of answer, to appellee's damage in the sum of \$1,100. The sole objection urged to said paragraph is that appellant asserts the injury complained of is not traced to the negligence charged by any proper averments. It is specifically alleged in said paragraph that the horses suffered and received said injuries by reason of the negligence charged. It follows that appellant presents no error respecting the ruling on said paragraph.

Appellant's criticism of the first paragraph of counterclaim, numbered five, as aforesaid, is the same as that made to the fourth paragraph of answer, to wit, that no causal connection is shown between the negligence charged and the damages suffered. An inspection of said paragraph discloses that such criticism is unwarranted. As against the

sufficiency of the second paragraph of coun-

2. terclaim, numbered six, as aforesaid, appellant argues that "nowhere in said paragraph is appellant charged with any negligence in loading or transporting said carload of horses." Appellant misinterprets this paragraph also which charges in substance that appellee delivered the horses to the initial carrier who received and loaded them into the car, and undertook to carry them safely to Lebanon, Tennessee; that said carrier transported them to St. Louis, Missouri, and there delivered them to the Louisville and Nashville Railway Company, which company received and reloaded them and undertook to carry them safely to Nashville, Tennessee; that said company did carry them to that point, and there delivered them to appellant company, which company received them, and as a common carrier for hire, undertook to

carry them safely to Lebanon, Tennessee, and to deliver them safely to appellee. Facts are alleged charging appellant and each of the other carriers with negligence in loading the horses into a car insufficient in capacity, and in failing to supply them with bedding and in operating the car in a violent manner, and in thus transporting the horses, and that as a result, several horses were killed and others injured, to appellee's damage in the sum of \$1,500; that appellee incurred expense in an effort to cure the injured horses in the sum of \$100. Prayer for judgment for \$1,400 and other proper relief.

Appellant filed a general denial to each paragraph of special answer, and also to each paragraph of counterclaim, and filed also a special reply

3. to said fourth paragraph of answer, and a special answer to each paragraph of counterclaim. Error is predicated on the court's ruling in sustaining a demurrer to the special reply and also to said special answer. Said paragraph of reply alleges in substance that appellant received the car of horses at Nashville on October 20, 1909, at seven o'clock a. m. and transported them to Lebanon, arriving at nine o'clock a. m. That the horses were in a damaged condition when so received by appellant, and that none of the injuries were inflicted while the horses were on appellant's road from Nashville to Lebanon. Said special answer is to the same effect as said special reply, except that the former contains an additional averment that appellant did not reload the horses on receiving them at Nashville, but transported them to Lebanon in the Louisville and Nashville car. The error, if any, in sustaining the demurrer to said special reply, and also to said special answer was harmless, for the reason that the facts therein pleaded were admissible under the general denial in each case pleaded thereto.

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Preparatory to a consideration of the questions presented on the overruling of the motion for a new trial, we proceed to determine certain preliminary matters, among them the nature and extent of the issue. As indicated, appellant, by its first paragraph of complaint, sued to recover on a check given for freight charges, and by its second paragraph to recover on an account stated, growing out of the same transaction as that in which the check originated. Under the evidence the latter cause of action was merged into the former. Appellant, by undisputed evidence, made its case on the issue presented on the first paragraph of complaint, and the general denial thereto, and a *prima facie* case as against the special answers filed to said paragraph of complaint. There was no evidence to sustain the defense of want of consideration pleaded by the second and third paragraphs of answer. The theory of the fourth paragraph of answer is to the effect that appellant, to the exclusion of the initial and connecting carriers, in transporting the horses, negligently injured them, whereby appellee suffered damages in excess of the amount of the check. It is not alleged in said paragraph of answer that there existed any sort of a joint arrangement to which the initial and connecting carriers and appellant as terminal carrier were parties, whereby it might be said that appellant is liable for damages occasioned by any breach of duty on the part of both or either of the others. The charge is that appellant received the horses and that appellant injured them, as alleged. It is, therefore, unnecessary for us to determine the circumstances under which there might be such joint liability, or a liability on the part of appellant for an injury growing out of the act of one or both of said other carriers. It follows that in order that appellee might establish

his defense as pleaded in the fourth paragraph of answer, it was incumbent on him to prove the injuries as pleaded inflicted by appellant rather than the other carriers. This brings us to a consideration of instruction No. 11 given by the court on its own motion.

By this instruction, the court in proper terms explained to the jury the facts necessary to be proved by appellant to make its case on the complaint. The instruction then proceeds thus: "If defendant has proven by a fair preponderance of the evidence \* \* \* that the plaintiff or its connecting lines injured or damaged his horses more than the amount of such check, then he has proven such paragraph of his answer as alleges such facts proven." It is evident from what we have said that the giving of this instruction was error. It predicates a defense in part on an injury that may have been inflicted by both or one of the other carriers. It remains to be seen, however, whether such error was harmful. If the evidence, aided by presumptions which the law indulges, shows that the injuries were inflicted while the horses were in appellant's possession, occasioned by appellant's fault, and there was no evidence to show that either of the other carriers had part in the inflicting of such injuries, then the error in giving such instruction was harmless, as it could not reasonably be presumed that the jury charged appellant with an injury done by the other carriers when there was no evidence that they inflicted any injury.

With practical uniformity, courts recognize the rule that where freight, including live stock, is received by the initial carrier in good condition, and is

5. delivered by the terminal carrier in a damaged condition, the presumption arises, the contrary not appearing, that such freight was delivered

to such terminal carrier in the same condition as when received by the initial carrier, by reason of which presumption the burden is cast on such terminal carrier to show that the freight was not injured while in its possession. The rule is stated in substance as follows: Where freight has been transported by successive carriers, and is damaged *en route*, and the evidence fails to show on what particular line the injury occurred, it will be presumed that it occurred on the line of the last carrier. 4 Elliott, Railroads (2d ed.) §1450; *Cleveland, etc., R. Co. v. Schaefer* (1910), 47 Ind. App. 371, 381, 90 N. E. 502; *Martin v. Kansas, etc., R. Co.* (1911), 139 S. W. (Tex. Civ. App.) 615; *Texas Pac. R. Co. v. Adams* (1890), 78 Tex. 372, 14 S. W. 666, 22 Am. St. 56; 6 Cyc 490, 491; *Atlantic, etc., R. Co. v. Riverside Mills* (1907), 31 L. R. A. (N. S.) 102, note.

The evidence showed, without conflict, that the horses were in good condition when delivered to the initial carrier, and that they were thereupon

4. loaded into a car of sufficient capacity, and with proper bedding to carry them safely.

There was evidence that after they had been transported to the vicinity of East St. Paul, Minnesota, like conditions existed. At St. Louis, Missouri, the horses were reloaded by the Louisville and Nashville Railway Company into a shorter and narrower car, which car containing the horses, was delivered to appellant by said company at Nashville, Tennessee, in which car appellant carried them to their destination. There was no evidence as to the condition of the horses or as to the sufficiency of their bedding after they left East St. Paul. The uncontradicted evidence showed that when the car reached its destination at Lebanon, Tennessee, many of the horses were seriously injured, several



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were down in the car under the feet of the others; that the car floor was so slick that the horses were unable to stand securely, and that there was no bedding. Appellant's witnesses, on the controverted points, testified by deposition. Several of its employes so testified to having examined the car at Nashville, but gave no testimony respecting the condition of the horses, or the presence or absence of bedding. One such witness in the employ of the Louisville and Nashville Terminal Company testified that it was a part of his duty to report on stock down in cars. He examined this load shortly after it was delivered to appellant, but gave no evidence as to whether any of the horses were injured or were down in the car. Appellant's conductor examined the load at Nashville, by looking through the cracks in the car, but testified that he was unable to ascertain the condition of the horses. This witness made the general statement that the horses received no injuries while the car containing them was in appellant's train. Aside from the fact that this statement does not necessarily cover the entire period of time within which the car was in appellant's possession, it is evident that such statement was the conclusion of the witness from the facts to which he testified, to the effect that the trip that morning was ordinarily smooth. The negligence charged in said paragraph of answer is that the car was insufficient in capacity and that bedding was not supplied. It does not charge that the car was negligently handled. Giving force to the presumption, as above indicated, the evidence showed without contradiction that the horses received their injuries while in appellant's possession. There was, therefore, no harmful error in giving instruction No. 11.

But the car in which the horses were carried over appellant's line was furnished by the Louisville and

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Nashville Railway Company, and there was  
6. no evidence that appellant made any change in it or in its condition. From this fact, it might be argued that if injury resulted from the insufficient capacity of the car or the absence of bedding therein, said Louisville and Nashville Railway Company, rather than appellant, should be held responsible therefor. Conceding that said company did furnish the car, and that there was insufficient bedding, there was no evidence that any injury resulted therefrom on the line of that company, and hence no action could have been maintained against that company for anything that occurred on its line. Moreover, appellant was under no compulsion to transport the horses in a car of insufficient capacity and defective equipment. By accepting the car, and undertaking to transport the horses therein, appellant made such instrumentality its own. Its responsibility flowing therefrom is exactly the same as if it had furnished the car on its own motion, and failed to supply it with bedding. We would not be understood as holding that from the fact that appellant adopted such instrumentality, as aforesaid, the Louisville and Nashville Railway Company would be relieved from liability for an injury inflicted beyond its own line, and on appellant's line based on the furnishing of a defective equipment, to be used in carrying the horses to their destination, if such be the case. We hold simply that the mere fact that the equipment was furnished by another company does not relieve appellant from liability.

2 Hutchinson, Carriers (3d ed.) §500; *St. Louis, etc., R. Co. v. Carlisle* (1904), 34 Tex. Civ. App. 268, 78 S. W. 553; *Wallingford v. Columbia, etc., R. Co.* (1886), 26 S. C. 258, 2 S. E. 19; *Shea v. Chicago, etc., R. Co.* (1896), 66 Minn. 102, 68 N. W. 608; *Texas*

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*Cent. R. Co. v. O'Loughlin* (1905), 37 Tex. Civ. App. 640, 84 S. W. 1104.

The infirmity, which we have pointed out, in instruction No. 11 exists also in instructions Nos. 12, 14, 16, 17 and 19. However, for reasons assigned in the discussion of instruction No. 11, the error in giving each of the others was harmless.

Complaint is made of instruction No. 13, which is as follows: "Railroad companies are common carriers, and are liable as such. They are insurers of the safe delivery of the property entrusted to them for transportation, and they will not be excused for a failure to make a safe delivery." The relation of this instruction to the issue joined on the paragraphs of counterclaim renders its consideration important, the scope and extent of which issue we proceed to determine. As indicated, the second paragraph of counterclaim charged in substance that appellant, as a common carrier for hire, received the horses at Nashville, and undertook to carry them safely and deliver them to appellee at Lebanon; that appellant failed to perform the duty thus assumed in that appellant negligently provided an improper car in which it transported the horses, and negligently failed to supply them with bedding, and negligently operated the train containing the car, and that as a result, the horses were injured as alleged. The first paragraph of counterclaim is similar to the second, one distinction being the charge in the former that the horses were received at St. Louis, Missouri, instead of Nashville, Tennessee. Said paragraphs of counterclaim tendered to appellant an issue of common-law liability, which was closed by general denial. On the subject of such common-law liability, it is said: "A common carrier of goods, in the absence of a con-

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tract limiting his liability, is an insurer, and, as such, bound absolutely and at all events safely to transport and deliver the shipment to the consignee or shipper at the point of destination. Under this rigorous rule of liability, the question of negligence is not considered. This doctrine has always as exceptions losses by act of God and the public enemy, to which from time to time have been added losses through the shipper's own neglect, losses caused by the inherent nature of the object of the shipment, and losses occasioned by seizure under valid court process." 5 Thompson, Negligence §6451. See, also, 4 Elliott, Railroads (2d. ed.) §1481. It thus appears that while common carriers of property are insurers, in the absence of a contract limiting their liability, they are such insurers only in a qualified sense. Thus, they are not insurers against injury resulting from the act of God or a public enemy, or from the inherent nature of the thing carried, etc., nor, in the absence of negligence on their part, are they liable for damages resulting therefrom. Thus, they are not insurers that fruits carried will not decay, or that liquids will not evaporate, or that animals carried will not inflict injuries on themselves or their fellows, through their natural disposition to be frightened, or to crowd, kick, hook, etc., nor, in the absence of negligence, are they liable for damages resulting therefrom. Subject to such limitations or exceptions, common carriers, in the absence of a contract as aforesaid, are insurers of the property carried by them. *Swiney v. American Express Co.* (1909), 144 Iowa 342, 115 N. W. 212, 122 N. W. 957; *Missouri Pac. R. Co. v. Harris* (1886), 67 Tex. 166, 2 S. W. 574; *Church v. Chicago, etc., R. Co.* (1908), 81 Neb. 615, 116 N. W. 520; *Coupland v. Housatonic R. Co.* (1892), 61 Conn. 531, 23 Atl. 870, 15 L. R. A. 534; 5 Thompson, Negligence §6471;

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*Cleveland, etc., R. Co. v. Schaefer, supra; Stiles v. Louisville, etc., R. Co.* (1909), 18 L. R. A. (N. S.) 86, note.

We have thus ascertained that said counterclaim declares on appellant's common-law liability. We have ascertained also that there are certain well

9. defined exceptions to the doctrine that common carriers of property are insurers. Proceeding with our discussion, it is a salutary rule, where as here the property carried is committed exclusively to the custody of the carrier, that the burden is on the carrier to allege and prove the existence of any such exception. *Cleveland, etc., R. Co. v. Schaefer, supra; Church v. Chicago, etc., R. Co., supra; Chicago, etc., R. Co. v. Slattery* (1906), 76 Neb. 721, 107 N. W. 1045, 124 Am. St. 825; *South, etc., R. Co. v. Henlein* (1875), 52 Ala. 606, 23 Am. Rep. 578; *Cooper v. Raleigh, etc., R. Co.* (1899), 110 Ga. 659, 36 S. E. 240; *McCoy v. Keokuk, etc., R. Co.* (1876), 44 Iowa 424; 5 Thompson, Negligence §6454; *Stiles v. Louisville, etc., R. Co., supra*, 93, note. In the case at bar there was nothing tending to show the existence of any such excep-

8. tion, and no claim to that effect was made.

Under such circumstances, there was no harmful error in the giving of instruction No. 13, as applied to this case, and especially when taken in connection with instruction No. 19, which advised the jury in substance that in measuring the damages it should exclude from consideration any injury or damage to the horses that would result from the mere fact of so long a trip by rail. An instruction somewhat similar to instruction No. 13 was condemned in *Cleveland, etc., R. Co. v. Rudy* (1909), 173 Ind. 181, 89 N. E. 951. In that case, the counterclaim alleged that the shipper by contract agreed to care for the animals in transit and at his own risk. It also

showed on its face that a portion of the damages for which the shipper sought to recover grew out of injuries resulting from the natural propensities of the animals.

Other instructions are criticized, but appellant has called our attention to no substantial error in them. Perhaps it is well for us to say that appellant in its "Points and Authorities", as set out in its brief, has directed no proposition specifically to instructions given. Under such circumstances, we would be warranted in declining to consider instructions given.

Among the causes for a new trial, appellant assigns misconduct of appellee, and surprise which ordinary prudence could not have guarded  
10. against. These assignments are based on the following facts: Appellee's counterclaim makes no reference to any special contract for the transportation of the horses. In each of the paragraphs, the allegation was general to the effect that appellant accepted the horses and undertook to carry them safely to their destination. On his cross-examination as a witness, appellee in response to questions asked him by appellant's counsel, stated that the initial carrier gave him what he designated as a waybill or shipping contract for the transportation of the horses, and that the car was billed from Montana to Lebanon, Tennessee, and that the waybill or contract was at his home in Franklin, Indiana, being the place of trial. The misconduct charged against appellee, and the excusable surprise which appellant claims resulted therefrom are based on the fact that appellee did not declare on such contract in his counterclaim, he having knowledge of its existence. If there was such a contract, it was not introduced or offered in evidence, nor was the court otherwise informed respecting its provisions. There was nothing to show that appellant was a party to

any such contract, or that it was entitled to avail itself of its terms, or that it was valid. There was nothing to show that appellant received or transported the horses under any such contract, or that it made any effort to cause it to be produced for the inspection of the court. In our judgment, both the indicated grounds for a new trial are untenable and likewise the claim that there is a fatal variance between allegation and proof.

Appellant contends that the verdict is excessive, and with this contention we agree. It is evident

that the transaction declared on in the first 11. paragraph of counterclaim is the same as that declared on in the second. The allegations of the former show damages in the sum of \$1,200, for which sum judgment is prayed. The latter shows damages by reason of injuries to the horses in the sum of \$1,500, and on account of expenses incurred in an effort to cure the horses, in the sum of \$100, with prayer for judgment in the sum of \$1,400. The amount that appellee may be entitled to recover must be determined from the facts pleaded, rather than the prayer. 1 Works' Practice §911; *Kettry v. Thumma* (1893), 9 Ind. App. 498, 36 N. E. 919. The limit of recovery then under the counterclaim is \$1,600. There was no evidence to sustain the second item of damages pleaded, and thus the limit of recovery is reduced to \$1,500. Appellant's first paragraph of complaint was established by uncontradicted evidence. Moreover, the facts necessary to a recovery on such a paragraph were practically conceded. On such paragraph, appellant was entitled to recover the amount of the check, with interest to the time of the trial, and the protest expenses in addition, or \$433.20 in all. The jury, evidently under the court's instruction to that effect, returned a verdict in appellee's favor for the



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difference between the damages found on the counterclaim, and the amount due appellant on the complaint. Under the allegations of the counterclaim, the amount of the verdict should not have exceeded the difference between \$1,500 and \$433.20, or \$1,066.80. Verdict in the sum of \$1,200 is therefore excessive to the amount of \$133.20. Such error may be corrected, however, by a remittitur. *Fairbanks v. Warrum* (1914), 56 Ind. App. 337, 104 N. E. 983. It is, therefore, ordered that if within twenty days, appellee shall file in this court a remittitur in the sum of \$133.20, to be effective as of the date of the judgment below, the judgment will be affirmed for the residue in the sum of \$1,066.80; otherwise, the judgment will be reversed, with instructions to sustain the motion for a new trial; in either case, costs against the appellee.

*Per Curiam.*—Since the decision of this case by this court, and within the time fixed in the opinion handed down October 9, 1914, conditionally affirming the judgment of the lower court, it has been made to appear to the satisfaction of this court that the condition on which said judgment was to be affirmed, to wit, that appellee should file in this court a remittitur in the sum of \$133.20, to be effective as of the date of the judgment below, has been fully complied with. It is, therefore, ordered that the mandate heretofore made and entered by this court in said cause be, and it is hereby modified in that the judgment of the court below in the sum of \$1,066.80 is now unconditionally affirmed, with the costs against appellee.

#### ON PETITION FOR REHEARING.

CALDWELL, J.—In its petition for rehearing, appellant urges three points: (1) that appellant can be held liable in this action only for damages caused by it; (2) that the evidence showed that forty-six horses

were received by the initial carrier, and that only forty-four of them were delivered to appellant and that appellant ought not to be held liable for the loss of the two; (3) that there was evidence that at least some of the injuries suffered by the horses transported by appellant were inflicted before they were delivered to appellant.

As to the first point, the holding in the original opinion is expressly in harmony with appellant's contention. As to the second point, the plead-

12. ings properly construed proceed on the theory of damages to the horses transported by appellant, and the evidence was directed to that end. There was no evidence offered on the subject of damage to any other horses than those transported by appellant. Under such circumstances, it can scarcely be presumed that the verdict includes any sum for damages on account of the loss of the other

13. two. In discussing the third point, appellant includes in its brief in support of the petition for rehearing certain alleged extracts from the testimony of appellee to the effect that the appearance of the wounds and bruises upon the bodies of the horses indicated that they may have been inflicted from six hours to two days before the horses were delivered by appellant at Lebanon. Neither this evidence nor its substance is set out or referred to in appellant's original brief. Under such circumstances, we are not authorized to consider it.

In certain particulars not referred to in the petition for a rehearing, we have modified the opinion as originally handed down, the result, however, not being changed. The opinion as modified will stand as the opinion of the court, and the petition for rehearing is overruled.

NOTE.—Reported in 106 N. E. 414, 1087; 109 N. E. 912. As to carriers of live stock as common carriers, see 63 Am. St. 548. On the

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burden of proof as to injury to live stock during transportation, see 17 L. R. A. 339. On the question of the liability for loss or damage to live stock shipments due to initial carrier's own negligence or breach of contract, see 31 L. R. A. (N. S.) 81. As to whether a carrier is an insurer of live stock transported by it, see 18 L. R. A. (N. S.) 86. As to the liability of a carrier of live stock for injury to the same, see 1 Ann. Cas. 158. As to presumption as to which of several connecting carriers is liable for injuries to goods carried, see 3 Ann. Cas. 584. See, also, under (1) 6 Cyc 515; (3) 31 Cyc 358; (4) 38 Cyc 1809; (5) 6 Cyc 490; (6) 6 Cyc 487; (8) 6 Cyc 376; (9) 6 Cyc 519; (11) 6 Cyc 531; (13) 3 Cyc 214.

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MARIETTA GLASS MANUFACTURING COMPANY v.  
BENNETT.

[No. 8,346. Filed October 16, 1914. Rehearing denied April 13, 1915. Transfer denied January 7, 1916.]

1. NEGLIGENCE.—*Essential Elements*.—To constitute actionable negligence, there must have been a duty owing from defendant to the plaintiff to protect him from the injury of which he complains, a failure by defendant to perform that duty, and an injury to plaintiff resulting from such failure. p. 442.
2. MASTER AND SERVANT.—*Inexperienced Servant*.—*Masterial Duty*.—It is the duty of the master, before exposing an inexperienced servant to the hazards of a dangerous service, to warn him and give him such instructions as will enable him to avoid injury, unless both the danger and the means of avoiding it are apparent. p. 442.
3. MASTER AND SERVANT.—*Temporary Change of Employment*.—*Assumption of Risk*.—*Masterial Duty*.—*Liability*.—Where the master orders a servant temporarily to do other work, involving different or greater dangers than those incident to the work within the scope of his employment, the servant does not by reason of the implication arising from the contract of employment assume the risk incident to such temporary work, and on assuming the latter duties the master must, if the servant is inexperienced, warn and instruct him, and the master's failure in this respect, if resulting in injury to the servant, renders him liable. p. 443.
4. MASTER AND SERVANT.—*Injuries to Servant*.—*Inexperienced Servant*.—*Temporary Change of Employment*.—*Complaint*.—Where it was reasonably clear that each paragraph of complaint, when considered in its entirety, proceeded on the theory that plaintiff was taken from his regular employment and required to perform work in the performance of which he had no previous experience, and which exposed him to dangers of which he was wholly ignorant, and that

defendant failed to warn or instruct him as to such new dangers, etc., neither paragraph was objectionable on the theory that the allegation that plaintiff was "transferred" to such new employment means that the change was permanent and contradicts the idea that plaintiff was injured while temporarily performing work not connected with his regular employment, and especially was the objection untenable in view of other allegations showing that by such transfer plaintiff was exposed to unusual dangers not ordinarily incident to such new work. pp. 443, 446.

5. MASTER AND SERVANT.—*Change of Employment.—Hidden Dangers.—Masterial Duty.—Assumption of Risk.*—Where a servant is transferred from his regular employment and required to perform work involving risks not ordinarily incident to the employment, of which he has no knowledge, and which would not have been contemplated or assumed by one originally employed at such work, it is the duty of the master, having knowledge of such dangers, to disclose them to the servant, and the latter will not be held to have assumed the risk of dangers unknown to him and not discoverable by him in the exercise of ordinary care. p. 444.
6. MASTER AND SERVANT.—*Injuries to Servant.—Knowledge of Defect.—Assumption of Risk.*—A servant is not necessarily to be charged with assumption of the risks growing out of a defect of which he had knowledge, or of which by the exercise of ordinary care he could have known, since, by reason of ignorance or want of experience, the risks and hazards may not have been so open and apparent as to be appreciated by him. p. 446.
7. MASTER AND SERVANT.—*Injuries to Servant.—Verdict.—Answers to Interrogatories.*—Where the issues tendered by the complaint in a servant's action for injuries sustained while working in a glass factory were such that a general verdict thereon amounted to a finding that the glass plaintiff was required to handle was extremely rotten and brittle, which was a condition not ordinarily incident thereto, and that he was required to handle it under conditions of temperature that made it unusually liable to break, answers to interrogatories returned by the jury showing that plaintiff was of mature age and had ordinary intelligence and knew that glass would break and that its edges would cut, etc., but from which it appeared that plaintiff lacked knowledge and experience with respect to handling glass and the dangers incident thereto, were not inconsistent with such general verdict. p. 446.
8. MASTER AND SERVANT.—*Injuries to Servant.—Harmless Error.—Instructions.*—In a servant's action for personal injuries sustained in handling glass, an instruction that plaintiff was entitled to recover if the injuries were directly or proximately caused by the negligence complained of, unless it was found that he was guilty of contributory negligence, though failing to mention assumption of risk, was harmless, in view of the findings of the jury in answer to interrogatories, and in view of the fact that the negligence charged

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was such that to make proof thereof plaintiff was required to show a state of facts necessarily relieving him from assumption of risk. p. 447.

9. **MASTER AND SERVANT.—Injuries to Servant.—Assumption of Risk.—Instructions.**—An instruction stating that generally a servant assumes all the ordinary risks incident to his employment, and those which are open and obvious and can be seen and appreciated by a person of ordinary intelligence, but that he does not assume the extraordinary risks of which he is ignorant and which are not obvious and open to the observation and which can not be readily seen and appreciated by a person of ordinary intelligence, and that if it was found that the danger encountered by the plaintiff in his work of carrying and handling glass was extraordinary and not open and obvious and could not have been readily seen and appreciated by a person of ordinary intelligence the plaintiff did not assume the risk so as to preclude recovery, was not misleading, and though omitting the question of actual knowledge, was harmless in view of express findings that plaintiff did not know of the dangers of handling glass and that such ignorance was due to lack of experience. p. 448.
10. **MASTER AND SERVANT.—Injuries to Servant.—Change of Employment.—Assumption of Risk.—Instructions.**—In an action for injuries to a servant who had been taken from his regular employment and directed to assist in carrying and handling glass, an instruction stating that if it was found that plaintiff was directed by defendant to carry and handle glass and that such glass was rotten, defective and unusually brittle, dangerous and liable to break in handling, of which facts the defendant knew or should have known, and that the plaintiff was ignorant thereof and had no notice or warning, and that while plaintiff was carrying and handling said glass and using due care said glass broke on account of its rotten, defective and unusually brittle condition, and injured plaintiff as alleged, the defendant would be liable, was not objectionable in omitting the question of defendant's knowledge of plaintiff's alleged ignorance. p. 449.
11. **MASTER AND SERVANT.—Injuries to Servant.—Obedience to Specific Command.—Assumption of Risk.**—A servant may obey a specific command of the master and go into a dangerous place and perform a dangerous task without assuming the risk, unless the apparent danger is such as to deter a man of ordinary prudence from encountering it. p. 450.
12. **APPEAL.—Review.—Harmless Error.—Instructions.**—Error, if any, in an instruction relating to the furnishing of appliances to a servant for handling glass, was harmless in view of the jury's answers to interrogatories showing that it was not the duty of the employer to furnish such appliances. p. 450.
13. **MASTER AND SERVANT.—Specific Directions.—Presumptions as to Risks.—Instructions.**—An instruction that it is the servant's duty to obey the orders and directions of the master, and that in the

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absence of notice or knowledge to the contrary he has the right to presume and to act upon the presumption that the master will not order him into a place of danger, or to perform dangerous work, without notifying him of such danger, and if the master does order him to do specified work, he has the right to presume, in the absence of knowledge or notice to the contrary, that it is reasonably safe for him to obey such orders and perform such work and that he is encountering no unusual dangers by doing so, was a correct expression of the law and applicable to the issues in an action for injuries to a servant, who, without experience or warning, was temporarily directed to assist in handling glass under circumstances involving extraordinary and unusual risks. p. 451.

14. APPEAL.—*Review.—Refusal of Instructions.*—There is no error in the refusal of instructions shown to have been covered by the instructions given. p. 451.

15. APPEAL.—*Review.—Verdict.—Conclusiveness.*—Where there is some evidence to support each of the material facts on which the verdict rests, the verdict will not be disturbed on the ground of insufficiency of evidence. p. 452.

16. APPEAL.—*Questions Reviewable.—Objections to Evidence.*—No question is presented for review on alleged erroneous admission of evidence where it appears that no objection was interposed to the question put to the witness until after the answer was begun, that none was made after the answer was completed, and that there was no motion to strike out the answer or any part of it. p. 452.

17. MASTER AND SERVANT.—*Injuries to Servant.—Damages.—Evidence.—Earning Capacity.*—In a servant's action for personal injuries proof of plaintiff's ability to earn money before his injury need not be confined to the particular work he was doing when injured. p. 453.

From Hancock Circuit Court; *Robert L. Mason*, Judge.

Action by Fred Bennett against the Marietta Glass Manufacturing Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

*Elmer E. Stevenson*, for appellant.

*Walter L. Carey*, for appellee.

HOTTEL, J.—This is an action for damages for personal injuries. The complaint is in two paragraphs. The averments common to both, omitting formal and other matters about which there is no controversy, are in substance as follows: Appel-

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lant is a corporation engaged in the manufacture of glass. Appellee was employed by appellant to work in its box-factory department where he was engaged in making boxes for the shipment of glass. On February 21, 1910, some time after he began work for appellant, he was transferred by appellant to what is commonly known as the lehr room of said factory, in which department appellee, with the assistance of another employe, was required to carry large plates of glass, which were about fifty inches wide, about ten feet long and about one-eighth of an inch thick; that he was required to carry the plates before they were properly cooled and while they were still hot, and the glass was rotten, defective and dangerous, and extremely liable to break in the carrying and liable to injure the persons handling the same, all of which facts appellant at all times well knew, and of which appellee was ignorant; that appellee was ignorant of the proper manner of handling the glass and of the danger of carrying the same; that he was not aware that it was rotten, defective, unsafe and liable to break and injure him; that appellant notwithstanding failed and neglected to in any manner instruct appellee as to the handling of the glass, or to give him any notice or warning whatever of the defective, rotten and unsafe condition of the glass, or of the danger of handling the same; that appellant failed and neglected to furnish appellee any appliance with which he could safely handle and carry the glass without being in great danger of being injured thereby, although such appliance should and could easily and readily have been furnished and provided by appellant as appellant at all times well knew; that appellant failed and neglected to provide appellee with any means of protection for his arms, hands and wrists while carrying the glass,



although the same could and should have been provided as appellant well knew; that on February 22, 1910, while carrying one of the plates of glass, the glass without warning and on account of its warm, rotten, defective condition, broke and thereby cut appellee's arm and wrist and severed the ligaments, tendons, blood vessels and nerves in his wrist and thereby rendered appellee's hand paralyzed, and his arm and wrist and hand practically useless; that appellee and his assistant at the time appellee received his injuries were using due care in the handling of the glass; that appellee's injuries were all caused and were the direct result of the carelessness and negligence of appellant in ordering, directing, and requiring appellee to carry and handle the hot, rotten, defective, brittle glass, and in failing and neglecting to instruct appellee as to the handling of the same, and in failing to provide appellee with the proper protection and appliances in carrying the glass.

The second paragraph differs from the first in that it charges that when appellee was transferred to the lehr room, he, with the assistance of another of appellant's employes, was *ordered, directed* and required by appellant, and *it became his duty in said department* to carry and handle large plates of glass, etc.; that such glass was defective, rotten and *extremely and unusually* brittle and liable to break; that appellee was ordered, directed and required to handle such plates of glass before the same had properly cooled, and while still hot and to carry them so *that they necessarily came in contact with currents of cold air; that such cold air coming in contact with said hot glass was liable to and did many times cause such plates of glass to break into fragments and fall around the employes handling the same*, thereby rendering it very dangerous for appellant's employes to carry

and handle such plates of glass. Knowledge on the part of appellant, and want of knowledge on the part of appellee, of said facts respecting the condition of said glass, the manner of handling it, and the dangers attendant thereon are alleged. It is also alleged that appellant notwithstanding its knowledge failed and neglected to in any manner instruct appellee as to the handling of the glass, and failed and neglected to give him any notice or warning whatever of the defective, rotten, extremely and unusually brittle and unsafe condition of the glass, or of the danger of handling the same and exposing the same while hot to cold currents of air, although appellant at all times well knew of appellee's inexperience and ignorance concerning all these facts.

A demurrer to each of said paragraphs for insufficiency of facts was overruled and answer in general denial filed. A trial by jury resulted in a verdict in favor of appellee for \$2,000. With the general verdict the jury returned answers to interrogatories. Over appellant's motion for judgment on such answers notwithstanding the general verdict and for a new trial, judgment was rendered on the verdict. The rulings on the demurrers and motions are severally assigned as error and relied on for reversal. It is insisted by appellant that neither of the paragraphs of complaint states facts sufficient to constitute a cause of action because, (1) no actionable negligence is stated against appellant; (2) the averments of each paragraph show that appellee assumed the risk; and (3) that the facts alleged do not warrant the application of the rule, where an employer orders an employe to do something not contemplated in his regular employment.

"In every case involving actionable negligence, there are necessarily three elements essential to its

part of the defendant to protect the plaintiff

1. from the injury of which he complains; (2) a failure by the defendant to perform that duty; and (3) an injury to the plaintiff from such failure of the defendant. When these elements are brought together, they unitedly constitute actionable negligence." *Chicago, etc., R. Co. v. Lain* (1908), 170 Ind. 84, 87, 88, 83 N. E. 632. See, also, *Cleveland, etc., R. Co. v. Morrey* (1909), 172 Ind. 513, 521, 88 N. E. 932; *Peru Heating Co. v. Lenhart* (1911), 48 Ind. App. 319, 329, 95 N. E. 680; *Indiana Rolling-Mill Co. v. Livezey* (1911), 47 Ind. App. 396, 404, 94 N. E. 732. We first inquire whether the first element is shown by the averment of each of
2. the paragraphs of complaint. "The master may not expose an inexperienced servant, at whose hands he requires a dangerous service, to such dangers without giving him warning. He is also required to give him such instructions as will enable him to avoid injury, unless both the danger and the means of avoiding it are apparent. This duty does not extend to employes of mature age who are familiar with the work they are called on to do and the risks incident thereto, but it does extend to inexperienced employes of mature years as well as those of tender age." *Osborn v. Adams Brick Co.* (1913), 52 Ind. App. 175, 183, 99 N. E. 530, 100 N. E. 472. See, also, *Atlas Engine Works v. Randall* (1885), 100 Ind. 293, 296, 50 Am. Rep. 798; *Republic Iron, etc., Co. v. Ohler* (1903), 161 Ind. 393, 402, 68 N. E. 901; *Republic Iron, etc., Co. v. Lulu* (1911), 48 Ind. App. 271, 276, 92 N. E. 993; *Consolidated Stone Co. v. Summit* (1899), 152 Ind. 297, 53 N. E. 235; *Bennett v. Evansville, etc., R. Co.* (1912), 177 Ind. 463, 468, 96 N. E. 700, 40 L. R. A. (N. S.) 963; 4 Thompson, Negligence §4065. "The servant's implied assumption of risks, which

accompanies and is a part of the contract of hiring, is confined to the particular work or class of work for which he is employed, and if the master orders him temporarily to do other work, involving different or greater dangers than those incident to the work within the scope of his employment, he will not by obeying such orders necessarily assume the risks incident to such other work. When such change of employment takes place, the master owes the duty of warning the servant of the dangers incident to the work so required of him, and likewise the duty of giving him instructions, where he is not familiar with the new duties to which he is so assigned. Where the master knows the servant so intrusted with new duties involving other or greater hazards is inexperienced in such work, and ignorant of the dangers incident thereto, the duty to warn and instruct is imperative, and failure to do so makes him liable for any injury resulting from such failure, where the servant has not negligently contributed thereto." *Osborn v. Adams Brick Co.*, *supra*, 183. See, also, *Pittsburgh, etc., R. Co. v. Adams* (1886), 105 Ind. 151, 164, 5 N. E. 187; *Republic Iron, etc., Co. v. Ohler*, *supra*, 403; *Newcastle Bridge Co. v. Doty* (1907), 168 Ind. 259, 264, 79 N. E. 485; *Cincinnati, etc., R. Co. v. Madden* (1893), 134 Ind. 462, 471, 34 N. E. 227; *Vandalia Coal Co. v. Price* (1912), 178 Ind. 546, 97 N. E. 429; *Chicago, etc., R. Co. v. Schenkel* (1914), 57 Ind. App. 175, 104 N. E. 50.

Appellant, however, contends that because the complaint states that appellee was *transferred* to another department, that it does not show that

4. appellee was injured while temporarily performing work not connected with his regular employment, but in fact shows that appellee was engaged in his regular employment when injured. We do not think that either paragraph of the com-

plaint, when read in its entirety, is open to such a construction. On the contrary, we think it reasonably clear that each paragraph proceeds on the theory that appellee was taken from his regular employment and “*required*” to perform work in the performance of which he had no previous experience, and that such new work exposed him to dangers of which he was wholly ignorant, and that appellant when making such transfer failed and neglected to give appellee any notice or warning of his new dangers, or any instructions as to the manner of performing such work. In the case of *Pittsburgh, etc., R. Co. v. Adams, supra*, 166, the Supreme Court said: “When, by order of the master, the servant is carried beyond his employment, he is carried away from his implied undertaking to assume the risks incident to the employment.” We are of the opinion, however, that either paragraph of the complaint, and especially the second paragraph, is good, even though we give to the word “*transferred*” the meaning insisted on by appellant. The complaint avers facts which show that the work of carrying and handling the kind of glass which appellee by his new work was required to handle in the manner and under the conditions which he was required to handle it, exposed appellee to unusual dangers not ordinarily incident to such work; that appellant knew such fact, and that appellee did not. Under the authori-

5. ties, these averments were sufficient to show that there was imposed on appellant at the time of the transfer of appellee, even though such transfer was to be permanent, the duty of giving some notice or warning of such unusual danger, the risk of which, in the absence of knowledge thereof, would not have been contemplated, or assumed by an employe, originally employed in such department of work. “In cases where an employe is required to

work among latent or hidden dangers known to the employer, but unknown to the employe, it would be the legal duty of the employer, having knowledge of such hidden dangers, to disclose them to the employe." The language just quoted is an instruction approved by the Supreme Court in the case of *Salem Stone, etc., Co. v. Griffin* (1894), 139 Ind. 141, 148, 38 N. E. 411. In discussing an objection to this instruction urged on the ground that it ignored the assumption of risk the Supreme Court on page 148 said: "Implied assumptions of risk are only such as are naturally incident to the service and those which are known or which ordinary care would discover and which are disregarded by the servant. Those dangers which are unknown to the servant, and not discoverable by him with ordinary care, but which are, or by ordinary care of the master should be, known to him, are not assumed. Of such the master is in duty bound to notify his servant and this at the peril of answering in damages." To the same effect, see, *Louisville, etc., R. Co. v. Wright* (1888), 115 Ind. 378, 16 N. E. 145, 17 N. E. 584, 7 Am. St. 432; *St. Louis, etc., R. Co. v. Valirius* (1877), 56 Ind. 511; *Republic Iron, etc., Co. v. Ohler, supra*; *Wright v. Chicago, etc., R. Co.* (1903), 160 Ind. 583, 66 N. E. 454; *Atlas Engine Works v. Randall, supra*.

The second paragraph of complaint is even stronger than the first, because it contains the additional averment that the appellant knew that appellee was without experience in the new work, and ignorant of its dangers. This averment would make the complaint sufficient to require notice and warning of the dangers, even though there was a new employment for the new work and the dangers were only such as were usually incident to the employment. *Consolidated Stone Co. v. Summit, supra*; *Kingman &*

*Co. v. Foster* (1913), 53 Ind. App. 511, 102 N. E. 103; *Osborn v. Adams Brick Co.*, *supra*; *Republic Iron, etc., Co. v. Lulu*, *supra*; *Republic Iron, etc., Co. v. Ohler*, *supra*. In the case of *Consolidated Stone Co. v. Summit*, *supra*, 302, the

Supreme Court said: "The mere fact that a

6. servant may know or could have known of a defect by the exercise of ordinary care does not necessarily charge him with an assumption of the risks growing out of such defect, because the risks and hazards on account thereof may not be so open and apparent as to be appreciated by him, on account of his ignorance or want of experience."

Each of the paragraphs states facts sufficient

4. to show that appellant owed to appellee a duty to warn him of the dangers of the work which it required him to perform and hence contains the element necessary to a good complaint, first above indicated. It is not seriously contended by appellant that there is an absence from the complaint of the other two necessary elements, showing that the warning was not given and that appellee's injuries resulted from the failure to give it. It follows that the demurrer to each paragraph of complaint was properly overruled.

Appellant insists that its motion for judgment on the answers to interrogatories notwithstanding the general verdict should have been sustained for

7. the reason that such answers show that appellee was a person of mature years; that he possessed ordinary intelligence and was a man of experience and knew that glass when being handled is liable to break, and that if it should break the sharp edges thereof are liable to cut one; that the defects consisted of stones in the glass which came necessarily in the manufacture thereof and that the breaking of glass from their presence and from



other causes is a common occurrence; that it was not customary in glass factories for employers to furnish, or employes to use, gauntlets or other protection for the wrists when handling glass; that if there was any defect in this glass it was a concealed defect. Under the issues tendered by the complaint appellee might have proven, and for the purposes of the question under consideration the general verdict is a finding, that he did prove an extremely rotten and brittle condition of the glass, not ordinarily incident thereto, and that appellee was required to handle it under conditions of temperature that made it unusually liable to break. The answers to interrogatories are not inconsistent with this finding and they fail to show that appellee was familiar with the handling of glass or the dangers incident thereto; but on the contrary show that appellee lacked knowledge and experience in such respect. A general verdict was a finding in favor of appellee of all the essential facts necessary to sustain his cause of action, and under the rule governing a conflict between the general verdict and answers to interrogatories, so frequently announced by this and the Supreme Court, the court did not err in overruling such motion.

Complaint is made of instruction No. 5 given by the court on its own motion. Such instruction is as follows: "Before the plaintiff in this cause is

8. entitled to recover, he must establish by a fair preponderance of all of the evidence: First. That he received the injuries or some part of the injuries set forth in his complaint. Second. That said injuries were directly, or proximately caused by the negligence or carelessness of the defendant in some one or more of the ways charged and set out in his complaint. If both of said proposi-

tions are established by a preponderance of the evidence, then plaintiff would be entitled to recover in some amount, as shown by the evidence, unless you should further find from a fair preponderance of all the evidence that the plaintiff himself, was guilty of negligence which contributed to his injuries, and in which case he would not be entitled to recover." It is true, as appellant contends, that this instruction makes no express mention of assumption of risk, but it does tell the jury that before it would be authorized in finding for appellee it must find that his injuries were directly or proximately caused by the negligence or carelessness of appellant, in some one or more of the ways charged and set out in his complaint. The character of the negligence charged, on which the verdict was evidently based, was such that before appellee's proof thereof could be complete he must have shown a state of facts that would necessarily relieve him from assumption of risk. The answers to interrogatories show that the verdict was not based on appellant's failure to furnish appellee with gauntlets, and further show that appellee was without experience in the handling of glass and ignorant of the dangers incident thereto. It therefore affirmatively appears from the record that no possible harm could have resulted from the giving of this instruction.

Instruction No. 2 given at appellee's request is objected to by appellant as being outside the issues. For reasons indicated in our discussion of the sufficiency of the complaint we think such objection untenable.

Complaint is made of instruction No. 3, given at request of appellee. This instruction is as follows:

- "While it is the general rule that a servant assumes all the ordinary risks incident to the work which he is employed to do, and those
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risks which are open to observation and obvious and can be seen and appreciated by a person of ordinary intelligence; yet he does not assume the extraordinary risks of which he is ignorant and which are not obvious and open to the observation and which cannot be readily seen and appreciated by a person of ordinary intelligence. So that if you find from all the facts and circumstances as shown by the evidence in this case, that the danger encountered by plaintiff, if any, in carrying and handling said glass was an extraordinary danger and one which was not open and obvious and could not have been readily seen and appreciated by a person of ordinary intelligence; then I instruct you that the plaintiff did not assume such risk so as to prevent him from recovering damages in this case.” It is claimed that this instruction is erroneous in that it omitted the question of actual knowledge on the part of the appellee of the dangers complained of. The latter clause of the instruction standing alone might be open to such construction, but, when read in its entirety, the instruction could not have misled the jury. In any event, appellant was not harmed by its giving, for the reason that the jury in its answers to interrogatories expressly found that appellee did not know of the dangers of handling glass, and that *this ignorance was due to lack of experience and knowledge.*

Instruction No. 4, which is also complained of, is as follows: “If you find from the evidence that

the plaintiff was required, ordered and directed by the defendant to carry and handle large plates of glass and that said glass was rotten, defective and unusually brittle, dangerous and liable to break in handling, and that the defendant knew or should have known such facts, and

that the plaintiff was ignorant thereof and had no notice or warning thereof, and that while plaintiff was carrying and handling said glass and using due care in the handling of the same and due care for his own safety, the said glass broke on account of its said rotten, defective and unusually brittle condition, and thereby injured plaintiff as alleged in the complaint; then I instruct you that the defendant would be liable for such injuries." It is claimed that this instruction is erroneous in that it omits the question whether appellant knew of appellee's alleged ignorance of the danger and for the further reason that it seems to declare that appellee might have been ignorant of the fact that ordinary glass will break. The instruction is not open to the second objection, and, for the reason indicated in our discussion of the sufficiency of the first paragraph of the complaint, the omission therein of the element of appellant's knowledge of appellee's inexperience, in view of the other elements of the instruction does not render it subject to criticism. A servant *may*

obey a specific command of the master and go  
11. into a dangerous place and perform a dangerous task without assuming the risk of so doing, "unless the apparent danger is such as to deter a man of ordinary prudence from encountering it." *Mellette v. Indianapolis, etc., Traction Co.* (1910), 45 Ind. App. 88, 96, 86 N. E. 432; *Brazil Block Coal Co. v. Hoodlet* (1891), 129 Ind. 327, 334, 27 N. E. 741; *Cincinnati, etc., R. Co. v. Madden* (1893), 134 Ind. 462, 34 N. E. 227.

Instruction No. 7 relates to the furnishing of appliances to the servant for handling glass. Such instruction, if erroneous, was harmless for the  
12. reason that the jury by its answers to interrogatories, found in effect that it was not the duty of the employer to furnish such appliances.

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*Huber v. Beck* (1892), 6 Ind. App. 484, 485, 33 N. E. 985; *Muncie Pulp Co. v. Koontz* (1904), 33 Ind. App. 532, 539, 70 N. E. 999; *New York, etc., R. Co. v. Lind* (1913), 180 Ind. 38, 102 N. E. 449; *Pittsburgh, etc., R. Co. v. Broderick* (1914), 56 Ind. App. 58, 102 N. E. 887.

Instruction No. 9 of which complaint is made, reads: "It is the duty of a servant to obey the orders and directions of the master, or his duly

13. authorized agent or foreman, and said servant has the right to presume, and to act upon the presumption, in the absence of notice or knowledge to the contrary, that the master or his agent or foreman, will not order him into a place of danger, or to perform dangerous work without his notifying him of such danger, and if the master or his duly authorized agent or foreman, does order said servant to do certain specified work, then said servant has the right to presume, in the absence of knowledge or notice to the contrary, that it is reasonably safe for him to obey such orders and to perform said work and that he is encountering no unusual dangers by doing so." It is claimed by appellant that this instruction is erroneous in that it ignores the fact that every one is chargeable with knowledge that glass is brittle and liable to break. The instruction is not open to this criticism, but on the contrary is a correct expression of a general proposition of law applicable to the issues and the evidence in this case.

The refusal of the court to give instructions Nos. 8 and 10 tendered by appellant is next urged as error. These instructions in so far as they were

14. pertinent and applicable to the issues and the evidence were covered by other instructions given.

It is insisted that the evidence is not sufficient to sustain the verdict. There was some evidence tend-

ing to show that at the particular time of the day when appellee was injured the glass would get low in the pots, and would contain particles of sand and clay which had settled to the bottom of the pots; that such particles of clay and sand, when present in the glass would render it rotten and brittle and much more liable to break, especially when exposed to currents of cold air; that some of the window lights were out of the windows in the lehr room and such room was cold on the day in question; that it was because of such conditions that the glass in question broke; that appellee, the day before his injury, was temporarily transferred from the work of making boxes to that of handling the plates of glass; that he had no experience in his new work, and because thereof objected to being transferred to such work; that the man whom appellee assisted in the handling of said glass made objections to appellant to working with appellee because of his lack of experience; that appellant, at the time it transferred appellee to such new work, gave him no warning of any kind as to any dangers incident to such new work, and no advice or directions as to the performance of such work. Where there is some evidence

to support each of the material facts on which  
15. the verdict rests, this court will not reverse on the ground of insufficiency of evidence.

Appellant's next objection relates to the admission of evidence. Appellee's father-in-law was a witness and testified that appellee prior to  
16. his injury worked for him—"laid brick and helped to do cement work, helped set cement blocks." The witness was then asked "About how much did he make at that business?" There was no objection to this question until the witness had made partial answer, as follows: "Well I took him in as partner after the first two or three months." At

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this point the appellant interposed an objection "to the question and answer of the witness thereto," which objection was overruled, and the witness continued with the answer as follows: "Well, he run on a average of four dollars a day." As before indicated, there was no objection made to the question before the answer was begun and none was made after the answer was completed. There was no motion to strike out the answer or any part of it. It follows that no question is presented by the record. We

might add that proof of appellee's ability to  
17. earn money before his injury was not confined to the particular work he was doing when injured. *Evansville Furn. Co. v. Freeman* (1915), 57 Ind. App. 576, 105 N. E. 258, 107 N. E. 27, and cases cited.

Finding no available error in the record, the judgment of the lower court is affirmed.

NOTE.—Reported in 106 N. E. 419. As to care required of master under law of master and servant, see 98 Am. St. 290. As to the master's duty to warn or instruct servant as to danger to which he is exposed, see 41 L. R. A. 143; Ann. Cas. 1914 A 609. On the master's duty to warn or instruct servant, generally, see 44 L. R. A. 33; 39 L. Ed. U. S. 465. As to the servant's assumption of risk in attempting dangerous work in obedience to orders without fully appreciating the danger, see 4 L. R. A. (N. S.) 838. For the servant's assumption of risk from latent danger or defect, see 17 L. R. A. (N. S.) 76. As to when risks of work outside scope of employment are deemed to be assumed by servant, see 48 L. R. A. 803. On the general question of the servant's assumption of risk see 38 L. Ed. U. S. 391. As to the assumption of risk by a servant in performing an act under the orders of the master, see 7 Ann. Cas. 435. See, also, under (1) 29 Cyc 419; (2) 26 Cyc 1173; (3) 26 Cyc 1172, 1205; (4) 26 Cyc 1393; (5) 26 Cyc 1172, 1219; (6) 26 Cyc 1201; (7) 26 Cyc 1513; (8) 38 Cyc 1815; (9) 26 Cyc 1503; (10) 26 Cyc 1505, 1506; (11) 26 Cyc 1221; (12) 38 Cyc 1815; (13) 26 Cyc 1182; (14) 38 Cyc 1711; (15) 3 Cyc 348; (16) 38 Cyc 1390, 1401; (17) 13 Cyc 202.



## BLISS v. GALLAGHER ET AL.

[No. 8,745. Filed June 18, 1915. Rehearing denied November 4, 1915. Transfer denied January 7, 1916.]

1. **TAXATION.—Foreclosure of Tax Lien.—Sale.—Collateral Attack.—**Unless the sale of land had in pursuance to an order foreclosing the tax lien and directing the sale is void for some reason apparent on the record, a collateral attack can not be maintained. p. 460.
2. **TAXATION.—Foreclosure of Tax Lien.—Sale Without Appraisal.—Validity.—**Section 8640 Burns 1894, Acts 1891 p. 199, §222, relating to quieting title to land purchased at sales for delinquent taxes, and providing for the foreclosure of tax liens where the delinquent sale is ineffective to convey title, does not contemplate or require that an appraisement of the land shall be had before offered for sale in pursuance to an order foreclosing the tax lien and directing a sale, and hence a sale without such appraisement is not for that reason invalid. p. 460.
3. **TAXATION.—Foreclosure of Tax Lien.—Sale.—Title Conveyed.—**The sale of property to satisfy the lien for taxes in favor of one who was the purchaser at a delinquent tax sale, made pursuant to an order foreclosing the lien and directing such sale in a proceeding to quiet title properly brought under §8640 Burns 1894, Acts 1891 p. 199, §222, and the execution of a deed in fee simple by the sheriff, carried to the purchaser a perfect title free from any claims of former owners. p. 461.
4. **TAXATION.—Foreclosure of Tax Lien.—Parties.—**A sale of land in 1900 pursuant to an order foreclosing a tax lien and directing such sale was binding on the grantors of one asserting title as against the purchaser at such sale, notwithstanding such grantors were not parties to the foreclosure proceedings, where it appeared that, though at the time holding a deed from the one in whose name the land rested during the period in which the taxes for which it was sold accumulated, they neglected to record such deed until several years after the foreclosure sale, in view of the provisions of §8640 Burns 1894, Acts 1891 p. 199, §222, that no outstanding unrecorded deed shall be of any effect as against the title or right of a complainant as fixed and declared by the decree made in a cause thereunder, and of §3962 Burns 1908, §2931 R. S. 1881, that a deed not timely recorded shall be deemed fraudulent as against a subsequent purchaser without notice. p. 461.
5. **TAXATION.—Tax Sales.—Quieting Title.—Statutory Provisions.—Right to Declare Lien.—**Under §8640 Burns 1894, Acts 1891 p. 199, §222, authorizing the purchaser of land at a sale for delinquent taxes to maintain a suit to quiet his title, the court in such a suit, if he finds such sale to have been insufficient to convey title, may declare the lien of the purchaser for taxes and penalty as valid, and order a foreclosure of such lien. p. 462.

6. **VENDOR AND PURCHASER.**—*Purchaser from Holder of Unrecorded Deed.—Notice.*—One purchasing from grantors whose claim or title rested on a deed which they had held for nineteen years without placing it of record, was chargeable with notice of the condition of the record and the rights of one who in the interval had purchased the land at a sale held pursuant to the decree in a proceeding foreclosing a lien for taxes. p. 463.
7. **APPEAL.**—*Review.—Harmless Error.*—Where it appears that the right result has been attained any intervening error will be deemed harmless. p. 463.

From Lake Superior Court; *Johannes Kopelke*, Judge.

Action by Jonathan Bliss against William S. Gallagher and others. From a judgment for defendants, the plaintiff appeals. *Affirmed.*

*Sheehan & Lyddick*, for appellant.

*E. Miles Norton, George P. Rose and L. V. Cravens*, for appellee.

**SHEA, C. J.**—Appellant brought this suit against appellees to quiet title to and obtain possession of certain real estate in Lake County, Indiana. The complaint was in two paragraphs, the first to quiet title, and the second in ejectment, to which appellees filed answer in three paragraphs, the first a general denial, the second setting up ten-year statute of limitations, and the third giving a history of appellees' interests, and how they were acquired. A cross-complaint was also filed by appellees, but no question is raised as to its sufficiency. Demurrers to the second and third paragraphs of answer were overruled. A reply in general denial to said paragraphs of answer, and to the cross-complaint, formed the issues submitted to the court for trial. Upon proper request, the court made a special finding of facts, and stated conclusions of law thereon.

In substance, it is shown by the special finding of facts that one John Saxe is the common source of title of both appellant and appellees, he having

purchased the land in controversy, being lots 7 to 21 inclusive, situate in Lake County, Indiana, from Frances M. Roe, on August 29, 1892, by deed duly recorded on August 30, 1892, whereby he became the full and legal owner of said lots. On May 6, 1893, he and his wife executed a deed for the lots to the father of Sarah A. Saxe, one Joseph Waterman, for the purpose of placing title in himself and wife together, which deed was duly recorded on June 21, 1893, and on June 12, 1893, Waterman, in accordance with previous arrangement, executed a deed for the lots to John G. Saxe and Sarah A. Saxe, husband and wife. This deed was not recorded until August 26, 1912. The lots in question were duly carried on the tax duplicate of Lake County from 1893 up to the present time, and the taxes assessed were properly extended from year to year; that said Waterman failed to pay any and all of the taxes assessed upon the lots during the years 1893 to 1898 inclusive, which were returned delinquent by the treasurer of Lake County to the auditor, and the lots were placed upon the delinquent list of the county for the year 1898. On February 14, 1898, the lots were sold by the proper officers to William S. Gallagher, appellee, while yet standing in the name of Joseph Waterman upon the tax duplicates and delinquent list; that William S. Gallagher paid the amount charged against the lots, and costs of sale, and received a certificate from the auditor and treasurer of the county, showing tax sale to him, and the amount for which the lots had been so sold. No person redeemed from the tax sale within the time prescribed by law, and on March 9, 1900, the auditor of Lake County issued to Gallagher a tax deed in statutory form. On March 27, 1900, Gallagher brought an action in the superior court of Lake County to quiet his title to the lots,

making Joseph Waterman a defendant thereto, but not John G. and Sarah A. Saxe. This complaint was neither changed nor amended. The affidavit filed for the purpose of obtaining an order for publication of notice to nonresident defendants stated that the action in which it was filed was one to quiet title to real estate in the county, and did not in any other manner indicate the nature of the action. None of the defendants named in the action ever appeared thereto, and upon affidavit duly prepared and filed, showing nonresidence of the defendants to his action, among whom was Joseph Waterman, the court ordered notice returnable June 4, 1900, to be given defendants by publication in a newspaper. On June 25, 1900, at the June term of court, the cause of William S. Gallagher against Joseph Waterman and others was submitted to the court, and it was found that the defendants had been duly notified of the pendency of the action by publication of notice for three successive weeks in the Lake County News, a public weekly newspaper of general circulation in said county, on the twelfth, nineteenth and twenty-sixth days of April, 1900. Thereupon defendants were duly called in open court, but made default. The cause was tried by the court without a jury, and a finding made for plaintiff Gallagher that although the tax deed introduced in evidence by him was insufficient to convey title, the same constituted a valid lien in his favor upon the real estate described, in the sum of \$59.92; that the lien should be foreclosed against all defendants, and in event they failed to pay the amount due plaintiff, together with costs and interest as set out in the decree of court, within sixty days from the date of judgment, the real estate described in the complaint should be sold by the sheriff of Lake County as lands are sold, with-

out redemption, to make the amount of plaintiff's claim. Judgment was rendered accordingly, and the sheriff was ordered by the court at said time to execute to the purchaser of the real estate a deed conveying same to him; that no person paid the amount so found due Gallagher upon his lien within the sixty days fixed, nor at any other time, and on December 1, an order of sale upon the judgment and decree was duly issued by the clerk of the court to the sheriff, who advertised the lots for sale under said order, and decree, in the manner and for the time prescribed by law preceding such sale in a public weekly newspaper in said county. On December 29, 1900, the sheriff proceeded to sell the lots, first offering the rents and profits thereof for a period not exceeding seven years, by the year, by parcels, and in gross, and receiving no bids, offered the fee simple right of defendants to each separate lot, for cash, or any or either of them, the purchaser to designate which, whereupon, receiving no bids, he offered and sold in compliance with the order, the fee simple right of defendants in and to the real estate described in the order of sale, for cash, to William S. Gallagher, executing to him his deed conveying the lots, based on the order of sale and judgment of the Lake Superior Court. That the sheriff before making the sale did not in any manner cause the lots, or any of them, to be appraised by any person, either as to their full value, or as to the value of the rents and profits thereon for a year or any term of years. Upon receiving the sheriff's deed Gallagher took exclusive possession of the lots and has held the same ever since, and now holds the same, a part himself, and a part by other defendants, as his tenants and licensees. That in fact Joseph Waterman had on June 12, 1893, executed a deed of conveyance to John G. and Sarah A. Saxe, but said deed was not

recorded until August 26, 1912, and at the time of his purchase of the lots at the tax sale, and at the time of carrying on his action to quiet his title to the lots, William S. Gallagher had no information or knowledge of any kind of the existence of the deed, or of the fact that said Waterman had ceased to be the owner thereof, and that John G. and Sarah A. Saxe had become the owners by virtue of the deed from Waterman to them. That John G. and Sarah A. Saxe, on August 19, 1912, sold and conveyed the lots to the plaintiff in this action, appellant Bliss, for a valuable consideration and said deed was duly recorded in the recorder's office of Lake County, August 28, 1912.

Upon these facts the court stated the law to be with appellees in this action; that appellant Bliss take nothing by his complaint; that appellee Gallagher is the owner of the lots described in the finding, and upon the cross-complaint of appellee Gallagher his title to the lots involved in this action should be quieted as against all claims of appellant, and rendered judgment accordingly.

The controlling questions involved in this appeal may be determined from a consideration of the court's conclusions of law, to which exceptions were duly saved.

The act in force and governing this transaction is the act of March 6, 1891, being §222, Acts 1891 p. 199, §8640 Burns 1894. It is argued that inasmuch as the sale was not ordered without relief from valuation and appraisement laws, the sale was invalid, because the property was sold without such appraisement. The facts found disclose that appellee Gallagher received a tax deed from the auditor of Lake County for the property in question March 9, 1900. He began his action to quiet title March 27, 1900. On June 25, 1900, appellee's deed

was declared insufficient to convey title, but his lien for the sum of \$59.52 was held to be valid, and was ordered foreclosed as against all defendants upon terms set out in the special findings. Pursuant to said order, the lots were sold by the sheriff on December 29, 1900. The deed was delivered to appellee, and he took immediate possession of the premises. This is conceded to be a collateral attack on the proceedings, and unless the sale is

1. void for some reason which appears from the record, it will withstand such attack. *Larimer v. Krau* (1914), 57 Ind. App. 33, 103 N. E. 1102, 105 N. E. 936; *Friebe v. Elder* (1914), 181 Ind. 597, 105 N. E. 151; *Dodge Mfg. Co. v. Kronewitter* (1914), 57 Ind. App. 190, 104 N. E. 99; *Palmerton v. Hoop* (1892), 131 Ind. 23, 30 N. E. 874; *Brooks v. Morgan* (1905), 36 Ind. App. 672, 76 N. E. 331.

Upon the question of valuation and appraisement of real estate sold pursuant to an order foreclosing a tax lien, under a former statute, the reason-

2. ing in the case of *Hall v. Craig* (1890), 125 Ind. 523, 25 N. E. 538, while decided before the passage of the statute under consideration, may well be applied to the construction of the present statute. The court, at page 527, used this language: "We are much inclined to doubt whether independent of any specific statute providing that there need be no appraisement or no right to redeem within one year after the sale upon a decree foreclosing a tax lien, the taxpayer has a right to insist upon an appraisement or to assert a right to redeem the property under the statute applicable to ordinary judgments. There is much reason for holding that tax liens are not subject to the rules which govern ordinary cases, for there is everywhere manifested in our revenue statutes the intention to make the system of assessing and collecting taxes a distinct and



independent one. The lien at the inception vests in the sovereign, it passes to the purchaser at the sale for delinquent taxes, rights of a peculiar nature are vested in him, and peculiar remedies are provided. The appraisement laws can not be made applicable to such cases, without radical changes, nor can our ordinary redemption laws." While the section of the statute under consideration does not expressly provide that the sale shall be without valuation and appraisement, the whole theory of our tax laws, as aptly stated by the learned judge who delivered the opinion in the case of *Hall v. Craig, supra*, warrants us in concluding that no such appraisement was contemplated or required. Therefore, no error can be predicated upon the failure of the court to so order such sale, and it follows that the sheriff's sale was in this respect fully in accordance with the law. The sale of property to satisfy the lien, and the execution of the deed in fee simple by

3. the sheriff, carried to appellee a perfect title, free from any claims of former owners. Such is the deed the sheriff is required to execute to a purchaser upon a decree foreclosing a tax lien.

It is earnestly argued that since the Saxes, appellant's grantors, were not parties to the record and proceedings of the court foreclosing the

4. lien for taxes, they are not bound thereby.

The findings of fact show that appellant claimed his title through John G. and Sarah A. Saxe, who held an unrecorded deed from Joseph Waterman for a period of nineteen years. Both appellant Bliss and the Saxes, therefore, derived their title through Joseph Waterman, who was duly made a party by publication. The findings disclose that the notice published was sufficient. No infirmity therein has been pointed out, and we are able to discover none which can affect the result in this

case. So much of the above section of the statute (§222, Acts 1891 p. 199, *supra*) as bears upon this point reads as follows—"and no outstanding unrecorded deed, mortgage or claim shall be of any effect as against the title or right of the complainant as fixed and declared by the decree made in such cause." It must be further borne in mind that §3962 Burns 1908, §2931 R. S. 1881, provides that deeds shall be recorded within forty-five days; that a deed not so recorded shall be deemed to be fraudulent as against a subsequent purchaser without notice of the existence of such unrecorded deed. Appellant Bliss is in no better position than the Saxes would have been, had they retained title, and instituted suit on their own behalf. The language with respect to the rights of a holder of an unrecorded deed is plain and unequivocal. His claims are of no effect as against the right and title of the complainant so fixed, and therefore, unless it can be said that the judgment or sale was void, appellant in this case can assert no rights in this appeal.

It is further argued that since the original complaint filed by appellee Gallagher was a suit to quiet his title obtained through a tax deed

5. executed by the sheriff, that the judgment of the court declaring said tax deed invalid, but holding the lien for taxes, and penalty as valid, and ordering a foreclosure thereof, was without the issues, and therefore invalid. The statute above quoted provides specifically that in such cases where the deed so executed is found to be invalid, the cause shall not be dismissed, but the lien of the State shall be transferred to the grantee, and shall be foreclosed upon the terms provided.

There are other principles of law, which, applied to the facts in this case, would defeat appellant's contention, which we need not discuss in detail.

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We suggest that since appellant's grant-  
6. ors, the Saxes, held an unrecorded deed for more than nineteen years, during which period of time, in so far as the record shows, they paid no attention to the property, but failed and refused to pay taxes assessed against it by the State, thereby avoiding all personal liability therefor, and leaving appellee in undisputed possession for more than twelve years of that time, neither the Saxes nor their grantor Waterman presents to this court a state of facts which appeals strongly for relief. Appellant Bliss evidently knew all the facts in connection with the transaction, as the deed to him from the Saxes was executed two days after the deed from Waterman to them was recorded. At all events, appellant Bliss is charged with full knowledge of the facts disclosed by the record. It is specially found that appellee Gallagher had no knowledge of the unrecorded deed held by the Saxes.

In view of the conclusion we have reached, we need not consider the alleged error of the court in  
overruling demurrers to the second and third  
7. paragraphs of answer. Any ruling of the court upon said demurrers would be harmless in so far as any rights of appellant are concerned. This court will not concern itself with intermediate errors in rulings on demurrers to pleadings, where a right conclusion is reached, as shown by the special findings. Sections 350, 407, 700 Burns 1914, §§345, 398, 658 R. S. 1881; *Ray v. Baker* (1905), 165 Ind. 74, 74 N. E. 619; *Board, etc. v. Wolff* (1906), 166 Ind. 325, 76 N. E. 247. Judgment affirmed.

NOTE.—Reported in 109 N. E. 215. As to who may purchase and enforce tax titles, see 75 Am. St. 229. See, also, under (1) 37 Cyc 1378; (2) 37 Cyc 1392; (3, 4) 37 Cyc 1394; (5) 37 Cyc 1520; (6) 39 Cyc 1719, 1726; (7) 3 Cyc 383.

## CUSHMAN v. HUSSEY ET AL.

[No. 9,365. Filed January 11, 1916.]

1. **INTOXICATING LIQUORS.—Elections.—Dismissal of Petition.—Appeal from Order of Board of Commissioners.**—The order of a board of county commissioners dismissing a petition filed before it praying for an election upon the question of whether the sale of intoxicating liquors as a beverage shall be prohibited, instead of ordering the election as provided for in §8316 Burns 1914, Acts 1911 p. 363, is a judicial act from which an appeal will lie in favor of any one aggrieved by such order. p. 466.
2. **APPEAL.—Right of Appeal.—Parties.—Interest.—Appeal by Taxpayer from Judgment Ordering Local Option Election.**—Where, on dismissal by the board of county commissioners of a petition for an election upon the question of whether the sale of intoxicating liquors should be prohibited, two of the petitioners, alleging they were aggrieved, appealed to the circuit court and there procured the issuance of summons on a remonstrant who as a taxpayer had moved for and procured the dismissal of the petition by the board, and the actual litigation was carried on between him and the petitioners, while the issues joined disclosed no other parties, the remonstrant had such an interest in the judgment of the circuit court ordering the board to hold the election as to preclude a dismissal of his appeal therefrom. p. 469.

From Gibson Circuit Court; *Simon L. Vandever*, Judge.

Proceedings on the petition of Sardius Boger and others for an election on whether the sale of intoxicating liquor should be prohibited. On appeal of Joseph Hussey and another from an order of the board of county commissioners dismissing the petition, the circuit court rendered judgment directing the board to hold an election, from which judgment this appeal is prosecuted. Motion by appellees to dismiss the appeal. *Motion overruled.*

*T. Morton McDonald*, for appellant.

*Henry Kister* and *Harvey Harmon*, for appellees.

MORAN, J.—Sardius Boger and 518 others, legal voters of the city of Princeton, Indiana, filed a peti-

tion as provided by statute, asking that an election be held to determine whether the sale of intoxicating liquors as a beverage should be prohibited within the city of Princeton. After the filing of the petition, appellant, designating himself, as a remonstrator and taxpayer addressed a written motion to the petition asking that the same be dismissed for the reason that there was on file in the auditor's office of Gibson County a remonstrance signed by more than a legal majority of the voters of the city of Princeton, remonstrating against the issuance of license to any person to sell intoxicating liquors as a beverage, which had been duly approved by the board, and had nearly two years in which to run, and that no license could be granted until this period of time had expired, and that the holding of an election would be a useless and needless expense. Upon the addressing of this motion to the petition asking for the election, the board granted the prayer of the motion and dismissed the petition; thereupon an appeal was taken to the Gibson Circuit Court by two of the petitioners. In addition to being parties to the proceedings in the commissioner's court, they filed an affidavit setting up that they were aggrieved by the decision of the board of commissioners. After the proceeding reached the circuit court, appellant entered a special appearance to the petition and by written motion moved to dismiss the appeal for the reasons assigned in the commissioners' court and that the appeal had been taken after the commissioners' court had adjourned and in vacation, and no summons had been issued for him to appear and likewise a stay of proceedings was asked until summons was issued. Upon motion of the petitioners who appealed summons was ordered for appellant to appear to the

petition and the motion to dismiss the appeal and to stay proceedings was overruled. After an unsuccessful attempt to quash the summons upon special appearance, appellant addressed a pleading to the petition similiar to the one addressed to the petition in the commissioners' court. This pleading was stricken out on motion of the petitioners who appealed and appellant reserved an exception to the action of the court. Thereupon, he filed an answer of general denial as a taxpayer to the petition and upon the issues thus joined a trial was had and the court found that the petition was sufficient and ordered that an election be held on June 24, 1915, to determine whether the sale of intoxicating liquors as a beverage should be prohibited in the city of Princeton, and further ordered and directed the board to give notice and to take such further steps as were necessary under the statute to hold such election. Appellant moved the court for a new trial, but the court refused to permit his motion to be filed. To the action of the court in this behalf appellant excepted. The prayer for an appeal was granted and bond filed and approved.

The many reasons assigned why the cause should be dismissed may all be summed up in the general proposition as to whether there was such a

1. judgment rendered in the circuit court from which an appeal could be taken, and as to whether appellant had such an interest as to entitle him to prosecute an appeal. In addition to the above, however, appellees suggest, rather than argue, that appellant has no standing in this court for the reason that mandate and not an appeal was appellees' remedy when the board refused to order the election. Section 8316 Burns 1914, Acts 1911 p. 363, provides among other things that whenever a petition has been signed by a given per cent of the

qualified voters, and filed with the county auditor, praying the board of commissioners for the privilege of determining by ballot whether the sale of intoxicating liquors as a beverage shall be prohibited, within a certain described territory, the board of commissioners at its next regular session shall order a special election in not less than twenty nor more than thirty days thereafter. Now where the board of commissioners refused to order an election by reason of an objection being interposed by a taxpayer and dismissed the petition therefor, Was the act judicial from which an appeal would lie? Under §6021 Burns 1914, §5772 R. S. 1881, an appeal may be taken by any one aggrieved from any decision of the board of commissioners. This statute allows appeals generally from decisions of the board of commissioners, and has received the following construction: "Where the duty of commissioners involves judicial action, an appeal lies from its judgment, unless the right of appeal is denied expressly or by necessary implication from the statute creating the duty. Where that duty does not involve judicial action, but consists in the performance of administrative, ministerial or discretionary powers, no appeal lies from such action, unless it is expressly authorized by statute." *Board, etc. v. Davis* (1894), 136 Ind. 503, 36 N. E. 141, 22 L. R. A. 515. See, also, *Grusenmeyer v. City of Logansport* (1881), 76 Ind. 549; *McGinnitie v. Silvers* (1906), 167 Ind. 321, 78 N. E. 1013.

In *Grusenmeyer v. City of Logansport*, *supra*, it was held that an appeal would lie to the circuit court under the general statute authorizing appeals from a board of commissioners, where the board of commissioners rejected a petition asking for the incorporation of a town; and in this cause, as in the cause at bar, the statute provided for a submission



of the question to the qualified voters within a given territory. In *State, ex rel. v. Board, etc.* (1892), 131 Ind. 90, 30 N. E. 892, the board ordered an election under the statute to ascertain if a certain toll road should be purchased by the county. The majority of the legal voters within the district voted in favor of purchasing the same, but notwithstanding, the board entered an order of record refusing to do so; and it was there said: "In the matter of determining the sufficiency of the petition to purchase a toll road, and in determining the sufficiency of the notice of the election, the regularity of the election, in canvassing the vote, and declaring the result, investigating and passing upon the title of the person, or company, to the road which is the subject of purchase, and in determining that such steps had been taken as authorizes it to complete the purchase, the board acts judicially." In *Board, etc. v. Karp* (1883), 90 Ind. 236, where a petition was filed by a taxpayer praying that the board subscribe for stock in a railroad in the name of the county, which had voted aid thereto, and the board refused to grant the petition. It was said: "We think that, without doubt, appellee was entitled to appeal from the decision of the board of commissioners. The question was not whether the board should act at all \* \* \* but whether the action taken and the decision made was the correct one. In making that decision, the board acted in a judicial capacity. From all decisions made when thus acting, there is a clear right of appeal." When the board of commissioners in acting upon a petition, which presents a question of fact to be passed upon and the decision of the board can not be collaterally challenged, the remedy is by appeal. *Bell v. Maish* (1894), 137 Ind. 226, 36 N. E. 358, 1118, and authorities cited. It will be noticed by the

statute under consideration that when twenty per cent of the qualified voters of a territory petition for an election to determine whether a majority of the legal voters within the territory desire that the sale of intoxicating liquors as a beverage shall be prohibited, the board shall order an election and the petition shall be deemed sufficient if it complies with the form designated by the statute. It is clear, we think, in view of the holdings that the board, in refusing to call an election by dismissing the petition, acted in a judicial manner from which an appeal would lie.

If the conclusion thus far reached is correct, then the only question remaining is, Has appellant such an interest in the judgment rendered order-

2. ing and directing the board to hold the election prayed for in the petition as to entitle him to appeal therefrom? It will be remembered that upon motion of the petitioners, who appealed, and who are appellees in this court, summons was ordered for appellant after the cause reached the circuit court. It has been held that one, who by his own voluntary act brings another party into a court as a party to an action, can not afterwards be heard to say that such a party is not a proper party to the record. *Renner v. Ross* (1887), 111 Ind. 269, 12 N. E. 508; *Clearspring v. Blough* (1909), 173 Ind. 15, 88 N. E. 511, 89 N. E. 369; *Marshall v. Watson* (1908), 171 Ind. 238, 86 N. E. 339. While the order to take the necessary steps under the statute to hold an election is directed against the board of commissioners, it amounts virtually to a judgment against appellant, as he was defeated so far as he was concerned in the litigation. The funds to defray the expenses of the election are raised by taxation, and being a taxpayer, he would be compelled to pay *pro tanto* to help defray the same. The ac-

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tual litigation was carried on between appellant and the petitioners in the commissioners' court, and between two of the petitioners (appellees herein) and appellant in the circuit court. The issues joined disclose no other parties. The appeal is in term time; there is no contention but that the proper appellees are before the court. If the board of commissioners desired to join in the appeal, it had notice of the appeal. §675 Burns 1914, Acts 1895 p. 179; *Small v. Hammes* (1901), 156 Ind. 556, 60 N. E. 342.

It is hardly necessary to state that what we have said applies to the questions involved in the motion to dismiss, and is not intended to apply in any manner to the questions going to the merits of this appeal, nor as to whether there is any question presented in reference to the filing of the motion for a new trial, there being other errors assigned independent of the action of the court as to the motion for a new trial. Motion to dismiss the appeal is overruled.

NOTE.—Reported in 111 N. E. 23. See, also, under (1) 23 Cyc 97.

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### HINTON ET AL. v. FALLS CITY SAVINGS AND LOAN ASSOCIATION.

[No. 8,925. Filed January 12, 1916.]

1. APPEAL.—*Assignment of Errors.—Waiver.*—Assignments of error are waived by appellants' failure to comply with Rule 22, clause 5, requiring appellants to set out in the brief each separate error relied on under "points and authorities." p. 473.
2. APPEAL.—*Assignment of Errors.—Questions Presented.*—No question is presented on an assignment of error challenging a conclusion of law by points in appellants' brief directed to the sufficiency of the evidence. p. 474.
3. APPEAL.—*Assignment of Errors.—Questions Presented.*—No question is presented by assigning as independent error matter that should have been presented to the trial court by motion for a new trial. p. 474.

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From Clark Circuit Court; *William C. Utz*, Special Judge.

Action by Dorsey D. Hinton and others against the Falls City Savings and Loan Association. From the judgment rendered, this appeal is prosecuted. *Appeal dismissed.*

*Warren B. Allison*, for appellants.

*Joseph H. Warder*, for appellee.

HOTTEL, J.—On May 2, 1912, appellant Gilligan (hereinafter referred to as appellant) with twenty-seven other coplaintiffs filed in the court below their amended complaint in which they alleged that they were depositors and stockholders in appellee association and that the assets thereof were insufficient to pay them as provided in the by-laws of such association. Other facts showing the insolvency of such association and the necessity for a receiver therefor are alleged and the appointment of a receiver asked. On June 5, 1912, appellee admitted its insolvency, and the court appointed a receiver who qualified and entered upon the discharge of his duties. On October 11, 1912, appellant filed an intervening petition in said cause in which she alleged that said association was indebted to her in the sum of \$1,912.50 on account of an alleged certificate of indebtedness for \$1,500 with interest coupons attached, filed with and made part of her petition. She asked that the receiver be required to pay her first after the payment of the expenses, etc.

There was a trial by the court and a special finding of facts, with conclusions of law stated thereon, as follows: "1. That the transactions between the intervener and said association do not constitute a loan of money to said association by the intervener. 2. That the certificate No. 151, held by intervener does not constitute a promise to pay under the law

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merchant, but is merely a certificate evidencing the amount of paid up stock, for which the intervener subscribed in said association and now holds. 3. The intervener being a paid up stockholder, she can have no preference in the payment of her stock over the holders of running stock, but will share in the proceeds of said association *pro rata* with other stockholders of whatever kind."

To each of these conclusions the appellant alone at the time excepted, whereupon the court rendered the following judgment: "It is therefore considered, adjudged and decreed by the court that the petitioner, Anna E. Gilligan, take nothing by reason of her intervening petition herein and that she have no preference in the payment of her stock over the holders of running stock, that she share in the proceeds of said association *pro rata* with other stockholders of whatever kind. It is further considered and adjudged by the court that the defendant recover of the said petitioner, Anna E. Gilligan, its costs and charges occasioned by the filing of said intervening petition to which decision of the court the said petitioner, Anna E. Gilligan, at the time excepts."

Appellant filed no motion for a new trial but prayed an appeal from the judgment rendered and the court gave her thirty days in which to file her appeal bond and sixty days in which to file her general bill of exceptions. On January 7, 1914, said appellant filed her appeal bond, but the transcript was not filed in this court until March 28, 1914, or more than sixty days after the filing of her appeal bond. This is, therefore, a vacation appeal. *Schultze v. Maley* (1914), 56 Ind. App. 586, 590, 105 N. E. 942, and cases cited.

In an assignment of errors in which appellant has named herself and her said twenty-seven co-

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plaintiffs as appellants, and said association as appellee, she says: "The appellants say there is manifest error in the judgment and proceedings in this cause in this: 1. The court erred in its conclusions of law No. 1 upon the special finding of facts. 2. The court erred in its conclusions of law No. 2 upon the special finding of facts. 3. The court erred in its conclusions of law No. 3 upon the special finding of facts. 4. The judgment appealed from is not fairly supported by the evidence. 5. The decision of the court is not fairly supported by the evidence. 6. The judgment appealed from is clearly against the weight of the evidence. 7. The decision of the court is clearly against the weight of the evidence. 8. The judgment of the court is contrary to law. Wherefore, this appellant prays that the judgment may be in all things reversed." This assignment is signed by " \* \* \* Attorney for Anna B. Gilligan."

Appellee has not briefed the case on its merits but insists on a dismissal of the appeal on the ground that appellant, by her brief, has presented no

1. question for this court's consideration; that this is so because appellant by her failure to comply with the rules of the court, has waived a consideration of its assigned errors, 1, 2 and 3, and that assigned errors, 4 to 8 inclusive, while they might be grounds for a new trial, if properly stated in a motion therefor, are not proper grounds for independent assignment. Appellee is correct in this contention. Assigned errors, 1, 2 and 3 are waived by failure to comply with Rule 22, clause 5, which requires appellant to set out each separate error relied on for reversal under his points and authorities together with the propositions of law and the authorities upon which she relies to present such respective errors. *Chicago, etc., R. Co. v. Dinius*

(1913), 180 Ind. 596, 103 N. E. 652; *Palmer v. Beall* (1915), *ante* 208, 110 N. E. 218, and cases cited.

Appellant's points under the first assigned error are directed to the sufficiency of the evidence to sustain the finding. Her exceptions to such conclu-

2. sions of law admitted for the purpose of such exception, that the facts within the issues were fully and correctly found. *Wills v. Mooney-Mueller Drug Co.* (1912), 50 Ind. App. 193, 199, 97 N. E. 449; *Pittinger v. Ramage* (1907), 40 Ind. App. 486, 82 N. E. 478. Assigned errors 2 and 3 are not referred to in appellant's points and authorities. Assigned errors, 4 to 8 inclusive, present no

3. question for the reason that they seek to present matters that should have been presented to the trial court by motion for a new trial. *Ewbank's Manual* (2d ed.) §§133, *et seq.*, and cases cited.

There are other irregularities and infirmities in the appeal and assignment of errors, apparent on the face of the record, above indicated, which are not considered because those insisted on by appellee are sufficient to authorize a dismissal of the appeal. *Palmer v. Beall, supra*. The appeal is therefore dismissed.

NOTE.—Reported in 111 N. E. 20. See, also, under (1) 3 C. J. 1409; 2 Cyc 1014; (2) 3 C. J. 1363; 2 Cyc 988; (3) 3 C. J. 1388; 2 Cyc 999.

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### SCHAEFER v. KEOKUK SAVINGS BANK.

[No. 8,903. Filed January 13, 1916.]

1. APPEAL.—*Briefs.—Questions Presented.*—Nothing is presented for consideration on a question sought to be raised where the points and authorities in appellant's brief are not applied to any specific error assigned. p. 475.
2. APPEAL.—*Assignment of Errors.—Briefs.*—No question is presented on alleged error in permitting a reply to stand by a brief which contains neither the reply, nor answer, nor complaint, but merely a meager statement as to the general character of the complaint and answer. p. 475.



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Schaefer v. Keokuk Savings Bank—60 Ind. App. 474.

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From Bartholomew Circuit Court; *Hugh Wickens*, Judge.

Action by the Keokuk Savings Bank against J. George Schaefer. From a judgment for plaintiff, the defendant appeals. *Affirmed*.

*John W. Donaker* and *Ralph H. Spaugh*, for appellant.

*Charles S. Baker* and *Frank N. Richman*, for appellee.

IBACH, C. J.—Appellee attacks appellant's brief as not presenting any question to this court. Appellant has argued but two questions, first, 1. that certain promissory notes involved were not inland bills of exchange, because not made payable at a bank in this State. However, in his points and authorities relating to this subject, he has not applied these points to any specific error assigned, but has discussed the subject generally, and under the rules of this court (Rule 22), he has presented nothing for our consideration. *Humboldt Fire Ins. Co. v. Ashby* (1915), 57 Ind. App. 682, 108 N. E. 150; *Johnson v. Bebout* (1915), 59 Ind. App. 159, 108 N. E. 967; *Curry v. City of Evansville* (1914), 56 Ind. App. 143, 104 N. E. 978; *Wolf v. Akin* (1914), 55 Ind. App. 589, 104 N. E. 308.

Appellant also discusses alleged error of the trial court in permitting a reply to stand, which he claims was a departure from the complaint, 2. but his brief contains neither the reply, nor the answers to which it is addressed, nor the complaint. A meager statement as to the general character of the complaint and answers is given, but not a word as to what were the statements contained in the reply, nor does he state what specific action of the court constituted the alleged error with relation to the reply, nor does he show in what man-

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ner the reply is a departure. The briefs are also faulty in other respects, and nothing is presented for our consideration. *Bottema v. Tracy* (1915), 58 Ind. App. 96, 107 N. E. 741; *Roark v. Voshell* (1915), 58 Ind. App. 203, 108 N. E. 18. Judgment affirmed.

NOTE.—Reported in 111 N. E. 17. See, also, under (1) 3 C. J. 1412; 2 Cyc 1014; (2) 3 C. J. 1415-1420; 2 Cyc 1014.

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THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY v. VINCENT.

[No. 8,741. Filed October 3, 1915. Rehearing denied December 17, 1915. Transfer denied January 13, 1916.]

1. RAILROADS.—*Animals on Tracks.—Liability for Injuries.—Statutes.*—In order to render a railroad company liable under §§5436-5442 Burns 1914, §§4025-4031 R. S. 1881, authorizing recovery for stock killed or injured on any railroad at any place where the same is not securely fenced, it must appear that the railroad was not securely fenced at the place where the stock entered thereon, and that such stock was injured or killed by some locomotive, car or other carriage operated on such railroad. p. 477.
2. RAILROADS.—*Animals on Tracks.—Statutory Liability.—Fences.—Burden of Proof.*—To escape liability for animals killed or injured upon its tracks imposed by §§5436-5442 Burns 1914, §§4025-4031 R. S. 1881, a railroad company has the duty to show affirmatively that the place where the animals entered upon its tracks was one which it was not bound to fence. p. 478.
3. RAILROADS.—*Animals on Tracks.—Injury.—Duty to Fence.—Question for Court or Jury.*—In an action under the statute against a railroad company to recover for stock injured or killed upon its tracks, where the facts as to the place where the stock entered, and the character of the place, are undisputed, the question of whether the place was one which the statute requires the company to fence is a question of law for the court; but where the evidence is conflicting as to the character of the place, the question is for the jury. pp. 479, 480.
4. RAILROADS.—*Statutory Provisions.—Duty to Fence.*—Under §§5436-5442 Burns 1914, §§4025-4031 R. S. 1881, a railroad company is not required to fence its road at stations, though the same are not frequently used, nor at places where fencing would interfere with the business and operations of the company and the safety of its employes, or where it would interfere with the public convenience. p. 480.

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5. RAILROADS.—*Animals on Tracks.—Action for Injuries.—Evidence.*—In an action against a railroad company under §§5436-5442 Burns 1914, §§4025-4031 R. S. 1881, to recover for the death of a horse, evidence showing that the horse while hitched to a buggy strayed from the place where left by plaintiff, that at a point where the tracks crossed a highway it turned east along the tracks leaving tracks of the buggy wheels between the rails, that the buggy was completely demolished, and that the horse was standing near the place of collision and was so injured that it died within ten minutes after the collision, warranted an inference that the horse was either on the track or so close thereto as to have been struck by the train, and was sufficient to sustain the verdict for plaintiff on that issue. pp. 480, 483.
6. RAILROADS.—*Animals on Tracks.—Liability for Injuries.—Statutes.*—Section 5436 Burns 1914, §4025 R. S. 1881, imposing liability on railroad companies for stock killed upon their tracks by "locomotives, cars or other carriages", etc., is not to be interpreted as meaning that in every case there must have been an actual contact or touching of the injured animal by the company's locomotive, car or other carriage in order to create liability. p. 482.

From Decatur Circuit Court; *Hugh Wickens*, Judge.

Action by Edwin B. Vincent against The Cleveland, Cincinnati, Chicago and St. Louis Railway Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

*L. J. Hackney, F. L. Littleton, J. O. Cravens, T. S. Cravens* and *T. E. Davidson*, for appellant.

*J. H. Connelley*, for appellee.

HOTTEL, J.—This is an appeal from a judgment in favor of appellee against appellant for \$87.50, damages for the loss of a horse killed upon appellant's railroad. The overruling of appellant's motion for a new trial is the only error assigned. The only grounds of this motion relied on for reversal are those which challenge the verdict of the jury as not being sustained by sufficient evidence and as being contrary to law. The complaint is based on

1. §§5436-5442 Burns 1914, §§4025-4031 R. S. 1881, which authorize a recovery for stock

killed or injured by the locomotive, cars, or other carriages on any railroad in this State where such railroad is not "securely fenced in". In construing this statute, both the Supreme Court and this court have held two things essential to recovery, viz., (1) that the railroad right of way was not securely fenced in at the place where the stock entered thereon, and (2) that such stock was injured or killed by some locomotive, car or other carriage operated on such railroad. *Peru, etc., R. Co. v. Hasket* (1858), 10 Ind. 409, 71 Am. Dec. 335; *Ohio, etc., R. Co. v. Cole* (1872), 41 Ind. 331, 332; *Baltimore, etc., R. Co. v. Thomas* (1877), 60 Ind. 107; *Croy v. Louisville, etc., R. Co.* (1884), 97 Ind. 126; *Louisville, etc., R. Co. v. Thomas* (1886), 106 Ind. 10, 5 N. E. 198; *Jeffersonville, etc., R. Co. v. Dunlap* (1887), 112 Ind. 93, 13 N. E. 403; *Childers v. Louisville, etc., R. Co.* (1895), 12 Ind. App. 686, 41 N. E. 21; *Pittsburgh, etc., R. Co. v. Vance* (1915), 58 Ind. App. 1, 108 N. E. 158.

It is insisted by appellant that as to the first of these elements the evidence shows that the place where appellee's horse entered the right of way was a place where, under the law, appellant was not required to fence and, that as to the second element there is a total failure of evidence.

It may be said in support of appellant's first contention that, while the statute in question is in general terms made applicable to all cases where

2. the railroad is not "securely fenced in", the courts have very properly so construed the statute as to engraft on it some exceptions. However, such decisions impose on the railroad company the duty of showing affirmatively that the place where the animals entered was one that it was not bound to fence. *Chicago, etc., R. Co. v. Modesitt* (1890), 124 Ind. 212, 24 N. E. 986; *Evansville, etc.,*

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*R. Co. v. Mosier* (1885), 101 Ind. 597; *Cincinnati, etc., R. Co. v. Parker* (1887), 109 Ind. 235, 9 N. E. 787; *Toledo, etc., R. Co. v. Fly* (1893), 8 Ind. App. 602, 36 N. E. 215. In this connection it is also

argued by appellant that "whether or not the

3. place where the mare entered and where she was when the injury occurred was one required to be fenced was a question of law for the court and not an issue of fact for the determination of the jury." Citing *Steward v. Pennsylvania Co.* (1891), 2 Ind. App. 142, 28 N. E. 211, 50 Am. St. 231; *Jeffersonville, etc., R. Co. v. Peters* (1891), 1 Ind. App. 69, 27 N. E. 299; *Atchison, etc., R. Co. v. McCall* (1915), 150 Pac. (Okl.) 173, 175; *Abbott v. Beaumont, etc., R. Co.* (1915), 177 S. W. (Tex. Civ. App.) 1052. There are statements in these cases that lend support to appellant's contention. The language, however, used by this court in the first two cases cited has been explained and limited by later expressions of such court on the same subject. Of course, if the facts as to the place where the stock entered, and the character of the place are undisputed, the question is wholly one of law; but where these facts are disputed, the question then becomes a mixed question of law and fact. *Baltimore, etc., R. Co. v. Dickey* (1909), 43 Ind. App. 509, 87 N. E. 1047; *Toledo, etc., R. Co. v. Cupp* (1893), 9 Ind. App. 244, 36 N. E. 445. When the evidence is conflicting as to whether a railroad track can properly be fenced at a given point, the question should be submitted to the jury under proper instructions. *Pennsylvania Co. v. Lindley* (1891), 2 Ind. App. 111, 28 N. E. 106; *Scheerer v. Chicago, etc., R. Co.* (1895), 12 Ind. App. 157, 39 N. E. 756.

A railroad company is not required to fence its road at stations used for receiving or discharging passengers or freight, although such stations are

not frequently used, and such company is not  
4. required to fence its road "where fencing would interfere with the business and operations of the company and the safety of its employes in the discharge of its duty to the public", or "where public convenience will not permit fences to be erected." *Chicago, etc., R. Co. v. Ness* (1914), 56 Ind. App. 285, 105 N. E. 250; *Indiana, etc., R. Co. v. Quick* (1887), 109 Ind. 295, 298, 9 N. E. 788, 925; *Steward v. Pennsylvania Co., supra*; *Fort Wayne, etc., R. Co. v. Herbold* (1884), 99 Ind. 91; *Jeffersonville, etc., R. Co. v. Peters, supra*, and cases cited.

It is not contended by appellant that its railroad, at the point in question, could not be fenced, but it claims that at such place its right of way is  
3. used as station grounds for unloading and loading freight and that therefore it was not required to fence at such point. The evidence on this point was conflicting and hence it was the duty of the court to submit such question to the jury under proper instructions applicable thereto.

As to the second element, *supra*, necessary to recovery appellant insists that there is no direct evidence of contact between its locomotive and  
5. appellee's horse, and no evidence from which such contact may be inferred. The evidence on this point is by no means satisfactory. It shows substantially the following facts, viz., appellee left his horse on the night in question tied to a weight and the weight thrown around one of the posts of a hitch rack in the village of Spades, Ripley County, Indiana. Such hitch rack was south of and near to the point where the highway crosses appellant's railroad. The railroad at this point consisted of two main tracks, the one on the south being known as the east main track, and the one on the north being known as the west main track. Some time after the

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horse had been left at the hitch rack it, as indicated by tracks and marks, started for home dragging the weight with it. As testified to by one of appellee's witnesses, the route taken could be traced by the tracks and mark made by the weight dragging on the ground from the hitch rack north to the point where the railroad crossed the highway. From this point on to where the horse and buggy were found, after the collision, the evidence varies. One of appellee's witnesses testified that it came from the hitch rack and went north until it just got to the track and then turned east on the track; "that you could see the tracks of the buggy. When I got to the track it looked as if one wheel went over the track. One wheel was in the track and the other was on the outside of the track." The left wheels were "just about in the middle of the track" and kept to the middle of the track just the length of the railroad iron or about 30 to 32 feet. The left wheel got over the south rail of the track about six feet east of the crossing. The head brakeman on the train that collided with appellee's horse and buggy testified on direct examination by appellee's attorney that he was on the fireman's seat on the left side of the engine cab and that he saw the top of a buggy wheel; that "it was located a foot and a half or two feet north of the north rail on the east bound track." The same witness on cross-examination, in response to a question as to where it was that he testified that he first saw the buggy wheel, answered: "I told you about a foot or a foot and a half south of the north rail." The evidence shows further that the buggy would weigh 500 pounds; that the pilot of the engine raised the buggy up and threw it over on its side; that the buggy was mashed to pieces, lying flat on the ground about



seven feet from the south rail of the tracks; that the rim of one of the buggy wheels was found on the pilot beam; that the speed of the train was about twenty-two miles an hour; that the pilot beam on the locomotive extended out beyond the rails as far as the end of the ties; that the horse was standing six to eight feet south of the track and west of and on a line with the buggy and with its head toward the west; that it was standing on three legs and had a hole in its side and seemed to be injured in the back; that it died in about ten minutes; that the buggy shaft on the side where the horse was injured was broken off. It seems to us that this evidence is sufficient to authorize the inference that the horse must have been on the track, or at least in such close proximity thereto that a striking would be unavoidable. In this connection however, it is urged by appellant, in effect, that the buggy was between

6. the locomotive and horse and that this fact prevents the inference of direct contact between the locomotive and the horse; that the hole in the horse's side was in all probability caused by the broken shaft of the buggy and that the horse's injuries may all be accounted for by the forced contact of the buggy with the horse. In other words, it seems to be appellant's position that a striking of the buggy to which the horse was hitched does not bring the case within the operation of the statute as construed by the decisions of the Supreme Court and this court, first above cited. It is true that there is language used in some of the cases that would indicate that an actual contact or touching of the killed or injured animal by the company's locomotive, car or other carriage is necessary to create liability. The language of the statute, however, does not warrant such a construction. It is as follows: "Any railroad corporation, \* \* \* shall be liable

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\* \* \* for stock killed or injured by the locomotives, cars or other carriages," etc. The authorities all agree that the injury or death of the animal in such a case must result from a collision of the railroad company's locomotive, car or other carriage with such animal, and it is in this sense, we think, that the courts have used the language relied on by counsel as supporting their contention. We do not interpret these decisions, or the language therein used, as meaning that in a case, like the one under consideration, where it is shown that death or injury to the animal resulted from a collision of the railroad company's locomotive, car or other carriage with a vehicle being drawn or conveyed by such animal, that in order to establish liability the plaintiff must go further and also show an actual contact or touching of such animal by the locomotive, car or other carriage. For the purposes of

this case, it would seem that a collision with

5. the buggy was a collision with the horse harnessed thereto and, that proof of the death of the horse from such collision, and as a direct and proximate result thereof, is sufficient to create liability under the statute, assuming, of course, that the other elements of such cause of action, were proven; but granting, without deciding that appellant's contention is correct, we are still of the opinion that the evidence, before indicated, viz., the location of the horse on the track, the width of the beam on the locomotive, the speed of the train, the weight of the buggy, the fact that when it was struck it was lifted up and, that one of its wheels was found on the flagstaff on the pilot beam, when considered in its entirety, is sufficient to warrant the inference of actual contact between appellee's horse and appellant's locomotive and hence, sufficient in any event to prevent our dis-

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turbing the verdict of the jury on the ground of the insufficiency of the evidence in such respect. Judgment below is therefore affirmed.

NOTE.—Reported in 109 N. E. 810. As to the duty of a railroad company to maintain fences and cattle guards, see 21 Am. St. 289. As to what are depot grounds within the meaning of fence laws, see 7 L. R. A. (N. S.) 203. For a discussion of depot or station grounds as being within the purview of a statute requiring a railroad to fence its tracks see, 11 Ann. Cas. 20; Ann. Cas. 1912 D 628. See, also, under (1) 33 Cyc 1181, 1184; (2) 33 Cyc 1278, 1281; (3) 33 Cyc 1307; (4) 33 Cyc 1190; (5) 33 Cyc 1292; (6) 33 Cyc 1185.

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### AMERICAN STEEL FOUNDRIES COMPANY v. CARBONE.

[No. 8,514. Filed June 18, 1915. Rehearing denied October 8, 1915. Transfer denied January 13, 1916.]

1. APPEAL.—*Questions Reviewable.—Sufficiency of Complaint.*—Under §§344, 348 Burns 1914, Acts 1911 p. 415, relating to procedure in civil cases, no question can be presented on appeal with reference to the sufficiency of a complaint, where the demurrer thereto is not accompanied by a memorandum of defects. p. 487.
2. ACTION.—*Commencement.—“Pending Litigation”.*—Where a complaint was filed in April, 1910, and on the tenth day thereafter defendant entered appearance, and in December following withdrew such appearance, no other steps having been taken, and then in October, 1911, *alias* summons was issued on motion of plaintiff, there was, until such summons was issued, no “litigation pending” within the meaning of §4 of the act of 1911 (Acts 1911 p. 415), relating to procedure in civil cases and providing that nothing therein should apply to litigation pending at the time the act went into effect, since under §317 Burns 1914, §314 R. S. 1881, an action is commenced by the filing of a complaint, the issuance of the summons and the placing of same in the hands of the sheriff, and any effect which defendant’s appearance may otherwise have had was necessarily obviated by the withdrawal of such appearance. p. 487.
3. MASTER AND SERVANT.—*Injuries to Servant.—Change of Employment.—Verdict.—Answers to Interrogatories.*—Where plaintiff, originally employed to operate a power-driven chipping machine in a steel mill, sought recovery for injury to his eye received while temporarily assisting at the work of “flogging” castings, on the theory that the latter work involved greater hazards and that he was inexperienced therewith, answers by the jury to interrogatories showing that in a general way “flogging” was quite similar to

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"chipping", except that "flogging" a casting was performed by two men instead of one and that the pieces cut or knocked off the casting were heavier and more liable to fly off, that though plaintiff was familiar with the duties of a "flogger" he had no practical knowledge of the work, and that he was temporarily performing work as a "flogger" at the time of his injury pursuant to an order to do so, accompanied by a threat of discharge for refusal to obey, did not show conclusively that plaintiff knew and appreciated the dangers of the work of "flogging", and were not in irreconcilable conflict with the general verdict. pp. 489, 491.

4. **APPEAL.—Review.—Answers to Interrogatories.**—In passing upon the sufficiency of the jury's answers to interrogatories to overcome the general verdict, the court will indulge all presumptions in favor of the general verdict and bring to its aid any evidence that could have been properly admitted under the issues. p. 491.
5. **MASTER AND SERVANT.—Injuries to Servant.—Change of Employment.—Assumption of Risk.**—A servant, though assuming the risks ordinarily incident to the work for which he was employed, on being temporarily transferred to work involving different or greater dangers than those incident to the work covered by his employment, does not necessarily assume the risks incident to such other work. p. 492.
6. **MASTER AND SERVANT.—Injuries to Servant.—Change of Employment.—Assumption of Risk.—Contributory Negligence.**—Where a servant is ordered to do work not contemplated by his employment, and which involves hazards equally apparent to the master and the servant, he is not necessarily barred from recovering for injuries resulting from such hazards while obeying such order, either on the theory of assumed risk or of contributory negligence. p. 492.
7. **MASTER AND SERVANT.—Injuries to Servant.—Change of Employment.—Assumption of Risk.—Contributory Negligence.—Jury Questions.**—Where a servant is directed to perform work not contemplated by his employment and not usually performed by him, it is a question of fact for the jury to determine from the evidence whether, in obeying such direction he assumed the risks incident, or whether he was guilty of contributory negligence. p. 495.
8. **APPEAL.—Review.—Evidence.—Verdict.**—Where there was some evidence to support the verdict and to warrant the inference of every ultimate fact essential to support the verdict, the verdict can not be disturbed on the ground that the evidence is insufficient, or that the verdict is contrary to law. p. 495.

From Lake Superior Court; *Lawrence Becker*, Judge.

Action by Tony Carbone against the American Steel Foundries Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

*Ralph F. Potter and Bomberger, Sawyer & Curtis,*  
for appellant.

*Hembroff & Glazebrook, McAleer Bros. and John H. Gillett,* for appellee.

FELT, J.—Appellee recovered a judgment against appellant in the sum of \$1,416.66 for personal injuries which resulted in the loss of an eye. The complaint is in one paragraph, and the averments material here, in substance, charge that in February, 1909, appellant employed appellee to operate a power-driven hammer or chisel and he continued to operate such hammer until June 9, 1909, on which day appellant carelessly and negligently ordered and directed appellee to leave his work at the hammer and go to a different part of its mill and assist another employe to chip pieces of iron and steel from mouldings and castings and, carelessly and negligently ordered appellee to hold an iron chisel while such other employe struck it with a maul or hammer; that appellee was unacquainted with such work which was different from that which he was employed to perform; that the work was more hazardous and dangerous than that which he was employed to do; that appellant carelessly and negligently failed and neglected to inform appellee of the dangerous and hazardous nature of the work that he was then ordered to perform; that by the order he was required to work with different employes and in a more hazardous place than he was accustomed to work and was required to use other and different instruments and tools from those he was employed to use; that in compliance with said careless and negligent directions of appellant, appellee went to said part of appellant's mill and while holding said chisel and performing such work, and without any negligence on his part, was struck in the

right eye by a piece of steel, by reason of which the sight of the eye was destroyed, that by reason of the aforesaid negligence of appellant and by reason of said injuries he was damaged in the sum of \$20,000. The complaint was answered by general denial and by the two-year statute of limitations.

With the general verdict the jury returned answers to interrogatories. A motion for judgment on such answers, and likewise, appellant's motion for new trial, was overruled. These rulings are presented by the assignment of errors, and it is also assigned that the court erred in overruling the demurrer to the complaint for insufficiency of facts to state a cause of action.

Appellee contends that no questions are presented relating to the sufficiency of the complaint

because there was no litigation pending with-

1. in the meaning of the act of 1911 (Acts 1911 p. 415, §§344, 348 Burns 1914), amending §§344, 348 Burns 1908, §§339, 343 R. S. 1881, when said act went into effect, and because no memorandum was filed with the demurrer to the complaint as required by

2. that act. Section 4 of said act (Acts 1911 p. 415) provides that: "Nothing in this act shall affect any litigation pending at the time this act takes effect." The record shows that the complaint was filed on April 7, 1910, and that on April 18, 1910, appellant by its attorneys entered an appearance to the suit. On December 27, 1910, an entry in said cause was made as follows: "Comes now the defendant by Bomberger, Sawyer & Curtis, its attorneys, and now withdraws its appearance heretofore entered herein." The next entry in the cause bears date of October 17, 1911, when, on motion of appellee, the court ordered an *alias* summons issued for appellant. On October 30, 1911, appel-

lant's attorneys entered a special appearance in the case and moved to quash the *alias* summons on the ground that the suit "was commenced by the issuance of said summons more than two years after plaintiff's cause of action accrued, which was on June 9, 1909." By §317 Burns 1914, §314 R. S. 1881, and the decisions construing it, a suit is commenced by the filing of a complaint and the issuance of a summons by the proper officer and causing the same to be placed in the hands of the sheriff. The record in this case does not show that a summons was issued prior to the appearance of appellant to the action in April, 1910, unless we infer the fact from the other facts shown by the record as above indicated. Be this as it may, the record fails to show that a summons was duly served on appellant prior to its appearance to the action, which appearance was withdrawn without objection from any one. It has been held in this State that it is within the judicial discretion of the trial court to permit a party who has appeared to an action to withdraw his appearance, and that, where a defendant who has not been served with process is permitted to withdraw his appearance, it is reversible error to render judgment against him upon default without procuring the issuance and due service of process upon him. It has also been held that when a defendant is permitted to withdraw his appearance, such action necessarily withdraws any pleadings he has filed in the case, and that to authorize a valid judgment against a defendant who has been permitted to withdraw his appearance the record must affirmatively show the issuance and due service of process upon him. *McArthur v. Leffler* (1887), 110 Ind. 526, 531, 532, 10 N. E. 81; *Young v. Dickey* (1878), 63 Ind. 31, 33; *Baker v. Ludlum* (1889), 118 Ind. 87, 89, 20 N. E. 648; *Baker v. Wambaugh*



(1885), 99 Ind. 312, 314. On the record in this case, it can not be held that after appellant withdrew its appearance in December, 1910, the court had jurisdiction of it until the issuance and service of process upon it in October, 1911. Since the court did not have jurisdiction of the defendant until the latter date, the suit was not "litigation pending" when the act of 1911, *supra*, went into effect on April 21, 1911. The demurrer presented after issuance of the summons in October, 1911, should have been accompanied by a memorandum as required by the act of 1911 (Acts 1911 p. 415, §344 Burns 1914) and since it was not, no question is presented as to the sufficiency of the complaint.

No questions are presented relating to the plea of the statute of limitations.

The answers to interrogatories show in substance that at the time of his injury appellee worked in appellant's shop where castings were cleaned

3. and chipped, and that he had worked for appellant about four months; that he was employed to chip and clean castings; that at the time of his injury he was perfectly familiar with the duties of a chipper and familiar with the danger of chipping castings; that the danger of chipping castings did not lay chiefly in the liability of being struck from particles chipped off by other workmen, but partly from the workman's own work; that there were no other dangers connected with chipping; that appellee during the four months of his employment chipped castings with a chisel propelled by steam or compressed air; that he also during said time used a hand hammer and chisel occasionally when the air chisel did not answer his purpose; that flogging consisted of one man holding a chisel at the end of a wooden handle while another struck the chisel with a sledge, thus chipping or breaking off

the part to be removed from the casting; that besides the size of the pieces chipped off and the number of men doing the work, there was a substantial difference in the character of the work of chipping by hand and flogging; that the work was done by two men and pieces cut off were heavier and more liable to fly off; that appellee at the time of the accident was familiar with the duties of a flogger; that appellee was injured while holding a chisel and flogging a casting; that he did not voluntarily take such chisel from the man theretofore using it; that he was ordered to do so by the foreman; that such foreman said to appellee: "Here, go and help this fellow for five minutes," and appellee said: "No, I don't want to go; that isn't my job," and the foreman said: "If you don't want to go you can take your coat and get right out of here; I will discharge you." That appellee had more than two years' experience as a chipper and had worked for more than two years in cleaning castings with hand and air hammers in steel foundries; that the danger of flogging consisted in being hit by particles flying from the operator's own work.

Appellant contends that the answers to the interrogatories show that appellee was familiar with the work of flogging and that there was no substantial difference in the character and manner of the work, or in the dangers incident thereto, from those of the work appellee alleges he was employed to do and that the injury resulted from one of the ordinary hazards of such employment, assumed by appellee.

The answers do show that appellee was familiar with the duties of a flogger, but they do not show that he had any practical experience in such work. The answers also show that the work of flogging was in a general way quite similar to the work of

cleaning and chipping, but they also show that flogging was done by two men instead of one and the pieces cut or knocked off the castings were heavier and more liable to fly off; that appellee was ordered from the work he was hired to do and was injured while performing work outside his usual employment; that he objected to the change of work and was threatened with discharge if he did not comply with the order to make the change.

All presumptions are in favor of the general verdict and, in considering the answers to the interrogatories, we may bring to the aid of the general

4. verdict any evidence that might properly be received under the issues of the case.

Evidence was admissible to show that notwithstanding the general similarity of the work appellee was doing when injured to that he was employed to do, he did not have the same chance to avoid injury when holding the chisel for another man to strike with a sledge as he did in chipping where he used smaller tools, worked alone, and he himself controlled all the tools used in doing the work. Also, that, while he had general knowledge of the work of flogging, he had no practical experience and did not know and appreciate the dangers incident to such work. Viewed from this standpoint, it can not be held that the work appellee was doing when injured was so similar in the manner of doing it and the dangers incident thereto, as to show conclusively that he knew and appreciated the dangers of the work he was doing when injured or could have known thereof by the exercise of ordinary care for his own safety. The answers are not in irreconcilable conflict with the general verdict. *National Fire, etc., Co. v. Smith* (1913), 55 Ind. App. 124, 139, 99 N. E. 829; *Osborn v. Adams Brick*

Co. (1913), 52 Ind. App. 175, 188, 99 N. E. 530, 100 N. E. 472.

Appellant insists that the verdict is not sustained by sufficient evidence and is contrary to law. Appellant contends that because of the similarity of the two kinds of work and appellee's opportunity of knowing the manner of doing flogging and the dangers incident thereto, he knew, or by the exercise of ordinary care for his own safety could have known the dangers incident to the work of flogging and therefore that the dangers incident thereto were assumed by him under his general contract of employment; that the dangers of both employments were due to flying particles from castings, and knowledge of one was necessarily knowledge of the other; that there was no duty resting on appellant to warn appellee of the dangers incident to flogging because the undisputed evidence shows they were already known to him. The risks assumed by an em-

ployee are those ordinarily incident to the  
5. particular work he is employed to do and where he is temporarily transferred from his usual work to other employment involving different, or greater, dangers than those incident to the work covered by his employment, he does not by obeying such orders necessarily assume the risks incident to such other work. *National Fire, etc., Co. v. Smith, supra*; *Osborn v. Adams Brick Co., supra*; *Cincinnati, etc., R. Co. v. Madden* (1893), 134 Ind. 462, 471, 34 N. E. 227.

It is the law in this State that a servant ordered to perform work not contemplated by his employment, involving hazards equally apparent to

6. both master and servant, does not by obeying such orders necessarily bar his right to a recovery for injuries resulting from such hazards and received while obeying such order. Where he is

directed by the master, or some one representing the master, to perform work outside his usual employment involving other or greater hazards than those incident to the work he was employed to do, he does not by continuing in the employment, and by undertaking to do such work, necessarily assume such different or greater hazards, nor, can it be declared as a matter of law that he is necessarily guilty of contributory negligence in so doing. In *Brazil Block Coal Co. v. Hoodlet* (1891), 129 Ind. 327, 336, 27 N. E. 741, the Supreme Court said: "When a master orders a servant to do something which involves encountering a risk not contemplated in his employment, although the risk is equally open to the observation of both, it does not necessarily follow that the servant either assumes the increased risk, or is negligent in obeying the order. If the apparent danger is such that a man of ordinary prudence would not take the risk, the servant acts at his peril. But unless the apparent danger is such as to deter a man of ordinary prudence from encountering it, the servant will not be compelled to abandon the service, or assume all additional risk, but may obey the order, using care in proportion to the risk apparently assumed, and if he is injured the master must respond in damages." In *Pittsburgh, etc., R. Co. v. Adams* (1886), 105 Ind. 151, 164, 5 N. E. 187, the Supreme Court said: "The servant's implied assumption of risks is confined to the particular work and class of work for which he is employed. There is no implied undertaking, except as it accompanies and is a part of the contract of hiring between the parties. When the servant voluntarily, and without directions from the master, and without his acquiescence, goes into hazardous work outside of his contract of hiring, he puts himself beyond the protection of the master's implied

undertaking, and if he is injured he must suffer the consequences. On the other hand, if the servant, by the orders of the master, is carried beyond the contract of hiring, he is carried away from his implied undertaking as to risks. If the master orders him to work temporarily in another department of the general business, where the work is of such a different nature and character that it can not be said to be within the scope of the employment, and where he is associated with a different class of employes, he will not, by obeying such orders, necessarily thereby assume the risks incident to the work and the risk of negligence on the part of such employes. He will not necessarily be guilty of negligence in obeying such orders of the master, even though they may carry him into more hazardous and dangerous work. Whether or not the servant may be negligent in obeying such orders will depend upon the facts and circumstances of each particular case. The facts and circumstances may be such as to show that in obeying such orders the servant voluntarily assumed the increased risks; or they may be such as to show that he obeyed the orders for a temporary change, under threats of discharge, or under such circumstances as that he might well have expected a discharge if he disobeyed." To the same effect are the following: *Cincinnati, etc., R. Co. v. Madden, supra*; *Flickner v. Lambert* (1905), 36 Ind. App. 524, 533, 74 N. E. 263; *Nall v. Louisville, etc., R. Co.* (1891), 129 Ind. 260, 271, 28 N. E. 183, 611; *Louisville, etc., R. Co. v. Hanning* (1892), 131 Ind. 528, 31 N. E. 187, 31 Am. St. 443; *Annadall v. Union Cement, etc., Co.* (1905), 165 Ind. 110, 74 N. E. 843; *Oölitic Stone Co. v. Ridge* (1910), 174 Ind. 558, 570, 580, 91 N. E. 944; *Newcastle Bridge Co. v. Doty* (1907), 168 Ind. 259, 264, 79 N. E. 485; *American Car, etc., Co. v. Clark* (1904), 32 Ind. App.

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644, 647, 78 N. E. 28; *Marietta Glass Mfg. Co. v. Bennett* (1916), *ante* 435, 106 N. E. 419; 4 Labatt, Master and Servant (2d ed.) §1387.

The effect of the numerous decisions cited, is that, where an employe by order of the master is directed to do work not contemplated by his

7. employment and not usually performed by him, the usual rule of assumption of risk does not apply when the servant is injured while performing such work. In such cases it becomes a question of fact for the jury to determine from the evidence whether, in obeying such orders and performing the work required of him he assumed the risks incident thereto, or whether, in performing such work he was guilty of any negligence proximately contributing to the injury for which he seeks a recovery.

In addition to the facts shown by the answers of the jury to the interrogatories, the general verdict is a finding in appellee's favor upon the propositions that the work of doing flogging was not so similar to the work of chipping and cleaning, which appellee was hired to do, as to show that the dangers incident to the work of a flogger were covered by appellee's contract of hiring and therefore assumed by him; that the dangers incident to flogging were not known and appreciated by appellee; that the apparent dangers of flogging were not such that a man of ordinary prudence would have refused to obey the order and assist in the work of flogging, under the circumstances shown by the evidence in this case.

There was some evidence tending to support  
8. the verdict and to warrant the inference from the evidence of every ultimate fact essential to support the verdict. Such being the case we can not disturb the verdict on the ground that it is not sustained by sufficient evidence, or that it is contrary to law. *National Fire, etc., Co. v. Smith*,



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*supra*; *Abelman v. Haehnel* (1914), 57 Ind. App. 15, 103 N. E. 869. *Annadall v. Union Cement, etc., Co., supra*; *Newcastle Bridge Co. v. Doty, supra*, 264, and cases cited; *Lowe Mfg. Co. v. Payne* (1910), 167 Ala. 245, 52 South. 447, 30 L. R. A. (N. S.) 436, note. No reversible error is shown. Judgment affirmed. Ibach, J., dissents.

### DISSENTING OPINION

IBACH, P. J.—I am unable to reach the same conclusion in this case as that expressed in the majority opinion. It is conceded that appellee's case proceeds upon the theory of a temporary change of his employment, the latter employment being more hazardous than the former. I have always understood that in order to recover on such a theory the injured party must make it appear that his injury was received on account of a risk or danger incident to the new employment which was not present in the old. That there was in fact a new danger connected with the new work is the foundation upon which the right of recovery rests. It is averred in substance that appellee was employed by appellant to handle, manage and operate a machine called a steam hammer and chisel and he did operate said hammer from February 15, 1909, to June 9, 1909, and on said latter day he was negligently and carelessly ordered by appellant to leave his work at the hammer and assist another employe of the company to remove pieces of iron and steel from mouldings and castings. That the work was different and more hazardous than that which he was originally hired to do and appellant negligently failed to inform him of the dangerous and hazardous nature of the work he was doing when injured. The undisputed evidence and the answers to the interrogatories show that the former work is styled "chipping" and the latter "flogging" by those engaged in such

employment. It also is shown that all this work was done in the same room, and was there done during all the months appellee worked for appellant and those engaged at the one service were near to those engaged at the other. The room was called the "chipping" room. Appellee's original work required him to chip and clean sand and metal from castings by the use of air hammers, hand hammers and chisels, and was usually done by one man, while the work of "flogging", the latter work, was done in the same general manner, except that it was done by two men, one to hold the chisel, the other to strike with the hammer, and it is apparent that this was necessary simply because in "flogging" larger particles were removed. While "chipping" and while "flogging," particles of metal, some small and others larger, flew in all directions about the room and there was no means of controlling the direction that any such particles would take when cut from the casting, but if there had been, certainly that means could have been ascertained by appellee while engaged in the use of the smaller chisels and smaller hammer. All the work done in this room was simple in its nature and easily understood by persons of ordinary intelligence, and appellee was such a person. Appellee testified that he was familiar with the duties of a "flogger" and this is quite evident, as he was constantly in a place where he was able to see the work performed and he himself was provided with a flogging hammer and chisel at the time he worked as a "chipper."

It is apparent to me that the work covered by his original employment was different from the latter only in degree and not in kind, and there was no change in the general nature and character of the work, only in the doing of the latter heavier tools

were used to accomplish the same end. Appellee was not injured by reason of any imperfect tools or because of the lack of skill on the part of his associate engaged in the particular work, but wholly on account of the particle of steel which they were removing, entering his eye. This identical condition and situation relative to flying particles of steel was constantly present before him when engaged in "chipping," his original employment, and the identical danger about which he claims he should have been instructed, is the same danger that was ever present about him when engaged in the work of a "chipper." So it is evident from the whole record that the danger incident to the doing of the work complained of, that is, that particles of steel would fly in many and all directions when removed from castings, whether by small chisels or large, struck by a small hammer or large, was as obvious in the latter employment as in the former, so that the master was under no obligation to warn appellee. There is no duty to warn an employe about matters which he knows. To my mind, there is no evidence to support the judgment. It does not seem necessary to cite authorities. We call attention, however, to a few which seem to fully support the position here taken. 1 Labatt, Master and Servant §456; 4 Labatt, Master and Servant (2d. ed.) §1379; *Indiana Stove Works v. Howden* (1909), 44 Ind. App. 656, 90 N. E. 16; *Dill v. Marmon* (1905), 164 Ind. 507, 73 N. E. 67, 69 L. R. A. 163; *Newcastle Bridge Co. v. Doty* (1907), 168 Ind. 259, 264, 79 N. E. 485; *W. B. Conkey Co. v. Larsen* (1910), 173 Ind. 585, 589, 91 N. E. 163, 29 L. R. A. (N. S.) 116.

NOTE.—Reported in 109 N. E. 220, 1095. As to assumption of risk as distinguished from contributory negligence, see 98 Am. St. 314. See, also, under (1) 3 Cyc 158; (2) 1 C. J. 1156; 1 Cyc 749; (3) 26 Cyc 1513; 38 Cyc 1927; (4) 38 Cyc 1928; (5) 26 Cyc 1205; (6) 26 Cyc 1221, 1272; (7) 26 Cyc 1478, 1482; (8) 3 Cyc 348.

## THE STANDARD BREWERY v. LACANSKI ET AL.

[No. 8,799. Filed January 14, 1916.]

1. APPEAL.—*Briefs.—Waiver of Error.*—Error, if any, in the overruling of a motion for a new trial is waived as to one of the defendants in whose favor the judgment was rendered, where appellant's brief, under "points and authorities" presents no question as to the decision of the trial court in favor of such defendant. p. 500.
2. ESTOPPEL.—*Estoppel in Pais.—Pleading.*—Where a party relies upon estoppel *in pais* to avoid a defense set up in the special answer, he must plead it. p. 501.
3. APPEAL.—*Review.—Evidence.—Conclusiveness of Decision.*—Where the evidence relied on by plaintiff as constituting an estoppel *in pais* against one of the defendants was conflicting, the decision of the trial court thereon was conclusive. p. 502.
4. HUSBAND AND WIFE.—*Contracts.—Suretyship of Wife.*—The test of the relationship sustained by a married woman who has joined her husband in the execution of a note is to inquire whether she received in person or in benefit to her property the consideration for which the note was executed. p. 503.
5. HUSBAND AND WIFE.—*Bills and Notes.—Suretyship of Wife.—Evidence.—Presumptions.*—In an action against a husband and wife on promissory notes, defended by the wife on the ground of suretyship, evidence, though conflicting, showing that she received none of the consideration for which the notes were given, that the loan was negotiated by the husband and that she knew nothing of it until called on to sign the notes, was sufficient to overcome the presumption arising from the face of the notes that they were the joint obligations of defendants, and rendered conclusive the finding that she was surety for her husband. p. 503.

From Lake Superior Court; *Lawrence Becker*, Judge.

Action by The Standard Brewery against Vasa Lacanski and another. From a judgment for defendants, the plaintiff appeals. *Affirmed.*

*Fred Barnett* and *Lyle McKinney*, for appellant.  
*McMahon & Conroy*, for appellees.

HOTTEL, J.—This is an appeal from a judgment in appellee's favor in a suit brought by appellant to recover the amount due on three promissory notes executed by appellees who are husband and wife.

The complaint is in one paragraph and is based on the notes, a copy of each of which is filed with and made part thereof. Each note is for \$200, bears date May 19, 1910, purports to be the joint obligation of the makers, is payable to "The Standard Brewery of Chicago, Ill., at The Indiana Harbor State Bank \* \* \* with interest at the rate of 6% per annum after date until paid with attorneys fees," etc., and each note is in substantially, if not exactly the same words, except that they are payable in one, two and three years from date respectively. Appellee Vasa Lacanski, hereinafter referred to as husband, filed an answer of adjudication and discharge in bankruptcy, and his wife, Anna Lacanski, filed an answer of suretyship. To each of said answers appellant filed a general denial. Upon the issues thus formed there was a trial by the court and finding and judgment against appellant and in favor of appellees. Appellant filed a motion for new trial based on two grounds, viz., that the finding of the court is not sustained by sufficient evidence and is contrary to law. This motion was overruled and such ruling is assigned as error and relied on for reversal.

Appellant in its brief, under "points and authorities," presents no question as to the decision of the trial court in favor of the husband, and hence,

1. any error in the ruling on the motion with respect to him is waived. Such points and authorities are directed to the correctness of the decision of the trial court with respect to the wife's defense of suretyship. Against the sufficiency of the evidence it is contended, (1) that "the mere fact that the defendants attempted to deny that they received any benefit from the money is no defense to Anna Lacanski"; (2) that "if it is shown that they made the representations to the appellant in order

to get the money, that is sufficient"; and (3) that it "was not compelled to see to the application of this money" and "if appellant loaned the money to appellees on the strength of their joint promises and assurance that it was to be used for repairing and improving the property, this was sufficient to bind the wife." In support of its second ground for new trial appellant relies on three propositions, viz., (1) "The determination of the question whether a married woman is principal or surety in an obligation to which her husband is a party is to be solved by inquiring whether she received in person or by benefit to her property the consideration for which the obligation was executed." (2) Where the makers of a joint note, for the purpose of securing the loan for which such joint note was given, represented to the lender that they desired to borrow the money for the purpose of improving and repairing property held by them by entireties, the joint obligation so given creates a presumption that the makers are joint principals, and equally responsible and liable on such joint obligation, and that in the face of this presumption there should be satisfactory proof to show that the wife is surety only. (3) It is not strictly correct to say that an appellate court will not reverse a judgment when the evidence tends to support the verdict, for there must be legal evidence sufficient to prove every material issue, in order that the judgment will be upheld.

Appellant's contentions, *supra*, with respect to the sufficiency of the evidence and its argument in support thereof would indicate that it was

2. not relying on the insufficiency of the evidence to sustain the answer of suretyship but rather upon the affirmative proof that appellees, at the time the money was loaned, represented that it was to be used for repairing and improving prop-

erty held by them by entirety, or in other words, appellant is relying on the doctrine of estoppel *in pais* to avoid the defense set up in the wife's separate answer. We have before indicated that the only pleadings filed by appellant were a complaint and reply in general denial. There was no reply of estoppel to the wife's answer of suretyship. While there is authority, especially in other jurisdictions to the effect that an estoppel *in pais* though not specially pleaded may be invoked upon the evidence, particularly where it is a mere incident of, and necessarily involved in, the cause of action or defense set up (8 Standard Ency. Proc. 682, 685; *Garlinghouse v. Whitwell* [1868], 51 Barb. [N. Y.] 208), it seems to be settled, at least by the later decisions of both courts of appeal in this State, that the party seeking to obtain the benefit of such defense in a case like the one here involved must plead it. *Webb v. John Hancock, etc., Ins. Co.* (1904), 162 Ind. 616, 69 N. E. 1006; *Smith v. McDonald* (1912), 49 Ind. App. 464, 468, 97 N. E. 556, and cases cited.

However, assuming without deciding, that the evidence affecting such defense was admitted without objection by appellees, either to its com-

3. petency or as to the purposes for which it might be received and considered, and that for such reason appellees have waived their right to now object to its consideration for the purpose indicated, we have examined the evidence and find that, even if sufficient in other respects to constitute an estoppel *in pais*, a thing we need not and do not decide, it is conflicting as to whether any representations were in fact made by the wife which will fully appear from the evidence hereinafter set out. It follows that upon such question the decision of the trial court is conclusive upon this court.



With respect to appellant's propositions, *supra*, in support of the second ground of its motion for a new trial it has been frequently declared that

4. the "test of the relationship sustained by a married woman to such obligations is to inquire whether she received in person or in benefit to her property the consideration for which the obligations are executed." *Leschen v. Guy* (1897), 149 Ind. 17, 48 N. E. 344, and cases cited.

Any presumption or *prima facie* case arising from the fact that the notes in suit were the joint obligations of both makers was overcome by the

5. other evidence in the case. The wife testified among other things that she never asked appellant for a loan, and never talked to any of its agents in regard to a loan; that she signed the notes at the request of her husband "for security as money for the saloon"; that she did not get any of the money, "not one cent"; that none of it was used in the repair of their property. It is also shown by the evidence that the loan was paid by check which contained on its face the word "loan" and was made payable to the husband; that he indorsed such check and obtained the money on it; that the husband had gone to appellant's office several times to obtain the loan and it was refused him unless he would get his wife to sign the note with him. The most that can be said in favor of appellant's contention is, that upon the question of the representations made by the wife to induce the loan and the question of whether she was in fact principal or surety on the notes given therefor, the evidence is conflicting. It follows that the decision of the trial court can not be disturbed upon either of the grounds for new trial here urged.

As affecting the questions considered and tending to support our conclusion see, §7855 Burns 1914, §5119 R. S. 1881; *Union Nat. Bank v. Finley* (1913),

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180 Ind. 470, 103 N. E. 110; *Wright v. Fox* (1914), 56 Ind. App. 315, 103 N. E. 442; *Voreis v. Nussbaum* (1892), 131 Ind. 267, 31 N. E. 70, 16 L. R. A. 45; *Crisman v. Leonard* (1890), 126 Ind. 202, 25 N. E. 1101; *Nixon v. Whitely, etc., Co.* (1889), 120 Ind. 360, 22 N. E. 411; *Cupp v. Campbell* (1885), 103 Ind. 213, 2 N. E. 565; *Vogel v. Leichner* (1885), 102 Ind. 55, 1 N. E. 554; *McCoy v. Barns* (1894), 136 Ind. 378, 381, 36 N. E. 134; *Harbaugh v. Tanner* (1904), 163 Ind. 574, 579, 71 N. E. 145; *Field v. Campbell* (1905), 164 Ind. 389, 393, 72 N. E. 260, 108 Am. St. 301; *Pabst Brewing Co. v. Schuster* (1914), 55 Ind. App. 375, 103 N. E. 950. Judgment affirmed.

NOTE.—Reported in 111 N. E. 80. See, also, under (1) 3 C. J. 1409; 2 Cyc 1013; (2) 16 Cyc 810; (3) 3 Cyc 360; (4) 21 Cyc 1465; 5) 21 Cyc 1567, 1571.

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### HARROLD ET AL. v. WHISTLER ET AL.

[No. 8,898. Filed January 14, 1916.]

1. PLEADING.—*Demurrer to Answer.*—*Memorandum.*—Under §344 Burns 1914, Acts 1911 p. 415, relating to procedure in civil cases, a demurrer to an answer, in order to present any question on appeal, must be accompanied by a memorandum pointing out the specific objections to such answer. p. 505.
2. APPEAL.—*Briefs.*—*Presenting Questions for Review.*—*Motion for New Trial.*—No question arising on the motion for a new trial is presented for review on appeal, where neither the motion nor its substance is set out in appellants' brief in compliance with Rule 22, clause 5, and the defect has not been cured by appellees' brief. pp. 506, 507.
3. APPEAL.—*Briefs.*—*Sufficiency.*—To constitute a sufficient compliance with Rule 22, briefs must be so prepared that all questions presented by the assignment of errors and relied on for reversal can be determined from an examination of the briefs without looking at the record. p. 506.
4. APPEAL.—*Briefs.*—*Sufficiency.*—Where appellants' brief contained a number of abstract propositions of law without directing them to any specific error relied on, it was insufficient to present any question. p. 507.

From Wabash Circuit Court; *A. H. Plummer*, Judge.

Action by Alvah N. Harrold and another against Emma E. Whistler and another. From a judgment for defendants, the plaintiffs appeal. *Appeal dismissed.*

*James A. May, Cole & Cole* and *McCracken & Eikenberry*, for appellants.

*Walter G. Todd* and *Franklin W. Plummer*, for appellees.

FELT, P. J.—This is an action for damages for breach of contract, which on trial by jury resulted in a verdict and judgment in favor of appellees. The errors assigned and relied on for reversal are: “(1) Error in overruling the separate and several demurrer of appellants’ to the second paragraph of the separate answer of appellee, Emma E. Whistler. (2) Error in overruling the separate and several demurrer of appellants to the second paragraph of the separate answer of appellee, Ephraim H. Whistler. (3) Error in overruling the joint, separate and several motion of appellants for a new trial.”

Our attention is called by appellees to the fact that no memoranda accompanied the demurrers on which the first and second assigned errors are based. §344 Burns 1914, Acts 1911

1 p. 415. In construing the amendment of 1911, *supra*, it has been held to apply to answers, and therefore, a demurrer to an answer, to present any question on appeal, must be accompanied by a memorandum pointing out in a substantial manner the specific objections to, or insufficiencies of, such answer. *Quality Clothes Shop v. Keeney* (1915), 57 Ind. App. 500, 502, 106 N. E. 541. Any defect not so pointed out will be deemed

waived. §§344, 348 Burns 1914, Acts 1911 p. 415.

The only remaining assignment questions the ruling on the motion for a new trial. Appellants have not set out their motion for a new trial,

2. or the substance thereof in their brief, and this omission is not supplied by appellees.

It has been held by this and the Supreme Court that the burden is on appellants to present error, and there must be at least a good faith effort to comply with the rules of the court and a substantial compliance therewith to entitle an appealing party to a consideration of the questions sought to be presented. Rule 22, clause 5, requires appellant's brief to contain a concise statement of so much of the record as fully presents every error and exception relied on, referring to the pages and lines of the transcript, which statement will be taken to be accurate and sufficient for a full understanding of the questions presented for decision, unless the opposite party in his brief makes necessary corrections or additions. It also provides that following this statement the brief shall contain, under separate heading of each error relied on, separately numbered propositions or points, stated concisely, and without argument or elaboration, together with the authorities relied on in support of them. "Rule 22 of the Supreme Court and this court has been

3. construed in many cases to mean that briefs must be so prepared that all questions presented by the assignment of errors and relied on for reversal, 'can be determined from an examination of the briefs without looking at the record, and to the extent said rule is complied with, the errors assigned will be determined and others will be considered waived.' " *Wilt v. Board, etc.* (1913), 54 Ind. App. 240, 242, 102 N. E. 878. Appellants by their failure

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to set out their motion for a new trial or the  
2. grounds thereof have waived their right to insist upon a determination of the questions arising thereunder. *Wilt v. Board, etc., supra: Tongret v Carlin* (1905), 165 Ind. 489, 75 N. E. 887; *Albaugh Bros., etc., Co. v. Lynas* (1911), 47 Ind. App. 30, 32, 33, 93 N. E. 678; *Cleveland, etc., R. Co. v. Beard* (1913), 52 Ind. App. 105, 100 N. E. 392.

Furthermore, in appellants' brief, under "concise statement of the record" they say: "Appellants in their motion for a new trial set out  
4. nine alleged errors of the court in the admission and exclusion of evidence." Under their "propositions and authorities" they set out a number of abstract propositions of law, none of which are directed to any specific ground of such motion, or to any specific error in the admission or exclusion of evidence, and therefore there is no such compliance with the rules as to present any question. *Palmer v. Beall* (1915), ante 208, 110 N. E. 218, and cases cited. No question being duly presented for consideration of this court, the appeal is dismissed.

NOTE.—Reported in 111 N. E. 79. See, also, under (1) 3 Cyc 158; (2) 3 C. J. 1415-1420; 2 Cyc 1013; (3) 3 C. J. 1409; 2 Cyc 1014; (4) 3 C. J. 1412; 2 Cyc 1014.

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SMILEY ET AL. v. STATE OF INDIANA, EX REL. TRUAX  
ET AL.

[No. 8,810. Filed November 18, 1915. Rehearing denied January 25, 1916.]

1. HIGHWAYS.—*Improvement.—Contractor's Bond.—Construction.*—The bond of a contractor for the improvement of a public highway, given under §7723 Burns 1914, Acts 1905 p. 521, §74, providing that the contractor "shall pay for any labor or material" that shall have been furnished to him or to any subcontractor, etc., is to be construed as a whole and in connection with the contract to

secure the performance of which it was executed, and, thus construed, the bond of a contractor conditioned that he "shall promptly pay all debts incurred by him in the prosecution of said work, including labor, materials furnished", etc., evidenced the intention of the parties to the bond to secure the payment of all labor and material used in the improvement of the road mentioned in the contract. p. 510.

2. HIGHWAYS.—*Improvement.*—*Contractor's Bond.*—*Liability.*—Where a contractor for the improvement of a public highway, on becoming unable to pay his laborers in cash, issued to them orders which they sold and assigned to defendants at a discount, such orders constituted debts of the contractor rendering him liable to defendants on his bond executed pursuant to §7723 Burns 1914, Acts 1905 p. 521, §74, although there would have been no such liability had defendants loaned him the money to pay his laborers, or had assumed to complete the contract for him. p. 511.
3. HIGHWAYS.—*Improvement.*—*Contractor's Bond.*—*Liability.*—Under the bond of a contractor for the improvement of a public highway, executed pursuant to §7723 Burns 1914, Acts 1905 p. 521, §74, a liability exists for fuel furnished to him and used in crushing stone for the highway and for hauling tools to the place of work, since, though such things do not become a physical portion of the completed road as materials do, they in fact become as much a part of the structure as labor performed upon it. p. 512.
4. HIGHWAYS.—*Improvement.*—*Assignment of Labor Claims.*—*Validity.*—*County Officers.*—Where defendant, who was awarded the contract by the board of county commissioners for the improvement of a highway, in lieu of cash issued to the laborers employed in such work orders which they sold and assigned to a certain firm, the assignment of such claims was not invalid as against public policy from the mere fact that one of the members of such firm was also a member of the board of county commissioners. p. 513.

From Morgan Circuit Court; *Nathan A. Whitaker*, Judge.

Action by the State of Indiana, on the relation of James Truax and another, against Milton T. Smiley and others. From a judgment for relators, the defendants appeal. *Affirmed.*

*Ira C. Batman, Robert G. Miller, James W. Blair, Homer Elliott and A. M. Bain*, for appellants.

*Willis Hickam and Hubert Hickam*, for appellees.

IBACH, P. J.—The substantial averments of the complaint and the court's special findings show the

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facts of this case to be as follows: In the year 1909, upon a proper petition, the board of commissioners of Owen County, Indiana, let a contract for the construction of a free gravel road in Wayne Township in said county to appellant Smiley. He, together with his coappellants as his sureties, executed a bond payable to the State of Indiana, conditioned that Smiley would construct the road according to the plans and specifications therefor and according to the terms and conditions of his contract and "pay all the debts incurred by him in building the road, including labor and material and for boarding laborers." Soon after commencing the work Smiley became financially embarrassed, was unable to pay labor and coal bills, and being unable to borrow he issued time checks or orders to his laborers for work done on the road and they sold them at ten per cent discount. James Truax and Lester Truax, relators, partners as Truax & Son, purchased a number of these orders and expected to be paid face value therefor. Since the laborers were required to discount their time orders, they refused to continue the work unless the contractors increased their wages to meet the discount. This was done and the work proceeded. Truax & Son continued to purchase the orders directly from the laborers, and took an assignment to themselves in writing of each order purchased. Truax & Son also sold Smiley coal to the amount of \$47.26 for crushing stone used in the construction of the road. After the purchase of the orders and furnishing the coal and before the acceptance of the road by the commissioners, Truax & Son and Smiley ascertained the amount of the orders purchased by them to be \$1,152.53, and that such sum was owing to them by Smiley. The accounting was reduced to writing, signed by Smiley, and by agreement, filed



by relators with the county auditor for payment when the road was completed, and was pending for adjustment when the road was accepted. The board found there was due and Smiley was allowed \$1,814.11, but Smiley and his sureties objected to the payment of the bill of Truax & Son out of the fund. The court found that there is due Truax & Son \$1,143.41 principal, and \$184.59 interest from the date of the orders, a total of \$1,328. The court also found that from January 1, 1907, to January 1, 1913, appellee James Truax was a member of the board of commissioners of Owen County, and participated in all the acts of the board relative to the pike, which was in his district and under his personal charge. When the work was accepted, there was a shortage in the fund and the relators brought this action against Smiley and his sureties on his bond. On such special finding the trial court stated its conclusions of law in appellee's favor and rendered judgment accordingly.

The errors assigned for reversal present in different ways one main proposition for consideration, Do Truax & Son, upon the facts, come within the terms of the contractor's bond, either by its

1. own terms or the statute under which it was given? The statute under which the bond here involved was given provides that the contractor "shall pay for any labor or material therefor that shall have been furnished to him or to any subcontractor, agent, or superintendent under him." §7723 Burns 1914, Acts 1905 p. 521, §74. The bond in suit provides that the contractor "shall promptly pay all debts incurred by him in the prosecution of said work, including labor, materials furnished," etc.

In arriving at the true intent of the parties to this bond, we are not warranted in looking to discon-

nected sentences merely, but we are required to consider the bond in its entirety, and consider it in connection with the contract to secure the performance of which the bond was executed. Thus considered, we think it is clear that the true intention of the parties to the bond was to secure the payment of all labor and material used in the building of the pike road mentioned in the contract. This is the only way that a laborer or materialman can be secured in the performance of work of this character. There is no provision for a lien to secure him, and there could be none, so by statute a contractor for building a pike road, when he obtains his contract, is required to give a bond to secure the laborers or materialmen. Consequently the decisions of our courts in applying mechanics' lien statutes and in applying the statutes which give laborers on railroads a preferred claim for labor performed within the last sixty days on the funds in the hands of the receiver have no application to the present case, as in this case no right of lien is given by statute to any one, and the laborer or materialman can only enforce his unpaid claim by suit on the bond, a thing which is not required in the other instances referred to.

It will be observed from the entire record that the parties treated the claims here involved as assigned labor claims, so that we need not consider the effect of the provisions of this particular bond, which are broader than the statute requires. The

2. special findings show that relators had not loaned the money here involved to the contractor to pay his laborers, if such had been the nature of the transaction and the bond included only the statutory conditions we have no doubt but that this bond would not secure the payment of such debt. Neither would the provisions of such bond

inure to the benefit of relators if they, in view of the financial embarrassment of the contractor, had assumed to complete the work and furnished the necessary funds to carry out the terms of the principal contract. The facts before us disclose that certificates were issued to the laborers showing the amount of time they had worked and the amount due each. These were purchased from the laborers directly, and an assignment to relators taken in writing. In such cases it has been held that they remain the debts of the contractor in the hands of the purchaser the same as if they remained in the hands of the laborers. *Lane v. State, ex rel.* (1895), 14 Ind. App. 573, 577, 43 N. E. 244; *Hart v. State, ex rel.* (1889), 120 Ind. 83, 85, 21 N. E. 654, 24 N. E. 151.

The judgment includes an item for coal furnished to operate the contractor's engine for crushing the stone used on the road, and for hauling tools

3. to the place of work. These we consider the same as material used in the construction of the road. Such things do not become a physical portion of the completed road as materials do, but they do in fact become as much a part of the structure as the labor performed upon it. This branch of the case has been very fully and ably discussed in the following cases. *Gilbert Hunt Co. v. Parry* (1910), 59 Wash. 646, 110 Pac. 541, Ann. Cas. 1912 B 225; *Hall v. Cowen* (1908), 51 Wash. 295, 98 Pac. 670; *City Trust, etc., Co. v. United States* (1906), 147 Fed. 155, 77 C. C. A. 397; *National Surety Co. v. Bratnober Lumber Co.* (1912), 67 Wash. 601, 122 Pac. 337.

The next question presented is, Was the assignment of the laborer's time orders to the firm of Truax & Son void as against public policy, because of the fact that James Truax, one of the

members of such firm, was a member of the

4. board of commissioners? The law is positive on the subject, that a public officer cannot deal with himself, or become interested in any contract in any manner that might influence his official conduct adversely to the interests of the public. In this case the evidence shows and the court finds that the firm of Truax & Son had nothing whatever to do with Smiley, the contractor, or with his contract. They did not furnish him any money to carry on his contract, and we fail to see how the purchase of some of the laborer's time checks could in any way influence the conduct of one of the firm who was the commissioner. He was in no manner dealing with himself with reference to any business in which the county was interested, neither did he thereby become interested in any contract in which the county was a party. Smiley had obtained the contract for building the road and had given a good bond to pay all the labor and material claims, and there was no way to collect the labor and material claims except by a suit on the bond, so that we fail to see what difference it would make to the county or the holders of any such claims whether the contractor made or lost money on the contract. The interests of the county and of the commissioner were not antagonistic, and the county was at no time interested in or connected with any controversy between Truax & Son and the contractor and Truax & Son at no time were interested in the contract with the county, or the proceeds of such contract. The road was reported completed by the superintendent and engineer, and accepted by the board of commissioners, who allowed Smiley the unpaid balance of his contract price, which was \$1,814.11. It was then also ascertained that the amount of debts con-

tracted by Smiley exceeded the amount of his final allowance by almost \$300, and then it seems Smiley and his bondsmen objected to the payment of the claims of the relators. Under these facts it seems that there was no time during the entire transaction between relators and Smiley, either when the time of the laborers was purchased, and the several assignments were taken thereof, or while seeking to collect them, when the rights of the public were affected on account of the fact that one member of the firm was county commissioner, and therefore we believe the law of public policy has no application.

We find no error in the record, and are convinced therefrom that a correct result was reached. Judgment affirmed.

NOTE.—Reported in 110 N. E. 222. On the nature of labor or materials which will support an action on a contractor's bond, see 43 L. R. A. (N. S.) 162; L. R. A. 1915 F 951. As to the right of one furnishing labor or material to sue on a bond given by the contractor to the owner, see Ann. Cas. 1916 A 754. As to the validity of a contract made by a public officer with himself, see Ann. Cas. 1912 A 867; Ann. Cas. 1916 A 237. See, also, under (1) 5 Cyc 754, 757; (2) 37 Cyc 235; 37 Cyc Ann. 235; (4) 29 Cyc 1435.

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BORG v. LARSON ET AL.

[No. 8,913. Filed January 25, 1916.]

1. NEGLIGENCE.—*Collision of Motor Vehicles.—Evidence.—Directing Verdict.*—In an action for injuries sustained by plaintiff in a collision with defendant's motor truck, where the evidence conclusively showed that plaintiff was riding a motorcycle along the street in the same direction in which the motor truck was being driven, that on the approach of the truck to an intersecting street the plaintiff, without warning or signal to the driver of the truck, attempted to pass on the right side of the truck while riding at an excessive speed and contrary to a city ordinance requiring overtaking vehicles to pass to the left, and notwithstanding there was ample room for his passage to the left, and that while he was in the

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act of passing the motor truck was suddenly turned into the intersecting street, thereby striking plaintiff and causing his injuries, the court properly directed a verdict for defendant. pp. 516, 518, 519.

2. TRIAL.—*Directing Verdict.*—*Duty of Court.*—Where it is clear from the evidence that a verdict, if returned for the party having the burden of the issue, can not stand, it becomes the duty of the trial court to direct the verdict. p. 518.

3. HIGHWAYS.—*Regulation of Use.*—*Law of the Road.*—*Negligence.*—While traffic rules of public thoroughfares, whether based on the law of the road, an ordinance or statute, are not inflexible and may be properly disregarded in order to escape from danger to one's self or to prevent injury to others, one can not recover for injuries sustained in his disregard of such rules where the facts disclose no excuse therefor. p. 518.

From Lake Superior Court; *Virgil S. Reiter*, Judge.

Action by Christ L. Borg against Charles Larson and another. From a judgment for defendants, the plaintiff appeals. *Affirmed.*

*F. N. Gavit* and *John C. Hall*, for appellant.

*William J. Whinery* and *John D. Kennedy*, for appellees.

MORAN, J.—A collision occurred between appellant's motorcycle and appellees' motor delivery wagon upon one of the thoroughfares in the city of East Chicago, Indiana. In an action by appellant for personal injuries alleged to have been caused by appellees, the court, at the close of the evidence, directed a verdict in favor of appellees.

The error relied on for reversal is the overruling of appellant's motion for a new trial, which directs our attention specifically to the action of the court in giving to the jury a peremptory instruction in favor of appellees. Briefly, the complaint discloses that on August 31, 1912, while appellant was traveling upon a motorcycle and appellees' servant was in charge of a motor delivery wagon, each going in the same direction upon 145th Street in East Chicago, a

collision occurred between the vehicles at a point where appellees' servant in charge of the motor delivery wagon attempted to turn into an intersecting street. It is alleged that the servant in charge of the motor delivery wagon carelessly and negligently and without warning to appellant turned sharply to the right over and against the motorcycle upon which appellant was riding and that appellant was violently thrown to the pavement and pushed against the curb of the street by reason of which he was greatly injured; and as a result thereof, he became sick, sore and lame and will be disabled during life. Prior to the injury appellees' servant had a plain view of the street, so that he could have seen appellant in time to have avoided the injury. Appellant was twenty-four years of age and in good health, and capable of earning \$100 per month, and by reason of the injury was damaged in the sum of \$5,000. An answer of general denial addressed to the complaint closed the issue, under which the

evidence was adduced and which discloses

1. that appellant was a car inspector on his way to the Standard Steel Car Company's plant at Hammond; his journey brought him over and upon 145th Street, over which he had traveled to his work for some four months prior to the accident. The street was paved and was about fifty feet wide, with cement sidewalks and curbing. That as he turned into this street he observed appellees' motor delivery wagon some distance ahead, both vehicles pursuing their way westward. Northcote Avenue intersects with 145th Street at right angles, but extends no further south. When both vehicles were in close proximity to the intersection of Northcote Avenue with the street upon which they were traveling, appellant, without giving any signal, attempted to pass the motor delivery wagon upon the



right side, traveling at the rate of about fifteen miles per hour, and the servant in charge of the motor delivery wagon was unaware of appellant's presence, and desiring to leave 145th Street attempted to turn into Northcote Avenue, and in doing so, the motorcycle upon which appellant was riding came in contact with the right front wheel of the motor delivery wagon.

At the time there was in force in East Chicago an ordinance regulating the traffic of vehicles of all kinds upon the streets and alleys of the city, and which provided among other things that a vehicle overtaking another should pass on the left side of the overtaken vehicle; and a person in charge of any vehicle should as soon as practicable turn to the right to allow the overtaking vehicle to freely pass to the left; and a person upon turning a corner of any street or crossing the intersection of any street should not drive or propel a vehicle with a greater rate of speed than eight miles per hour. Appellant testified that after he had followed the automobile two blocks, and was within about seventy-five feet of the same, he made up his mind to pass on the right side; that he was traveling faster than the vehicle ahead, and there was nothing to prevent him passing on the left side. The delivery wagon had a top, which was closed at the sides and open at the back. That he observed the driver and the driver did not look back, and in order to observe appellant he would have to do so. Appellant gave no signal of any kind that he was attempting to pass. The accident occurred in an instant. A witness, who observed the collision, testified that the boy in charge of appellees' conveyance tried to avoid the accident after he observed appellant by attempting to swing his machine out to the west, but the street was too narrow and swung the motorcycle

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and rider into the curb. Charles A. Larson, who was in charge of appellees' motor delivery wagon, testified that at the time of the accident he was driving the conveyance at the rate of about six miles per hour, and had no knowledge that appellant was following him, and saw appellant for the first time just as he was making the turn into Northcote Avenue from 145th Street, and that appellant attempted to dodge around by turning in a kind of a circle into the intersecting street; that he applied the brakes, but when the compact took place, the steering gear was knocked out of his hand; and both vehicles and occupants were carried to the curb.

When and under what circumstances a trial court is justified in directing a verdict has received much attention by this and the Supreme

2. Court, and a review of the authorities would serve no useful purpose. In *Westfall v. Wait* (1905), 165 Ind. 353, 73 N. E. 1089, 6 Ann. Cas. 788, the rule seems to be clearly stated as follows: "If the evidence was of such a character as to make it clear to the court that a verdict, if returned for appellant, on whom the burden of the issue rested, could not stand, then it became the duty of the court to direct a verdict for appellees". When appellant overtook appellees' servant in charge of the motor delivery wagon, there was, as is disclosed by the evidence, ample room for him to have

1. passed to the left of appellees' conveyance, and in doing so he would have been obeying the ordinance, which appellees' servant had a right to expect, without being chargeable with negligence.

Traffic rules of public thoroughfares, whether  
3. based upon the law of the road, an ordinance or statute, are not inflexible rules. *Neal v. Rendall* (1903), 98 Me. 69, 56 Atl. 209, 63 L. R. A. 668. "Emergencies may arise where, in order to

escape from danger to one's self or to prevent injury to others, it will be not only excusable, but perfectly proper to temporarily violate the general rule." 2 Elliott, Roads and Sts. (3d ed.) §1081. However, the facts in the case at bar are not such as to disclose any excuse for appellant departing from the traffic rules of the street, upon which appellant and appellees' servant were traveling at the time of the collision, and to hold appellees guilty under the circumstances would be to hold that appellees' servant was bound, by reason of being on a public street, to be on the alert for the violation of such traffic rules and regulations by appellant. *Pick v. Thurston* (1903), 25 R. I. 36, 54 Atl. 600; *Elgin Dairy Co. v. Shepherd* (1915), 183 Ind. 466, 108 N. E. 234, 109 N. E. 353. We have carefully examined the evidence, and are satisfied that the same, with all the legitimate inferences which the jury

1. might reasonably have drawn therefrom, would be insufficient to sustain a verdict in appellant's favor on the negligence charged. The court did not err in directing the verdict. *Gregory v. Cleveland, etc., R. Co.* (1887), 112 Ind. 385, 14 N. E. 228; *Dunnington v. Syfers* (1901), 157 Ind. 458, 62 N. E. 29; *Westfall v. Wait, supra*. It is finally contended by appellant that should the court reach the conclusion that a recovery could not be had on the general charge of negligence that the facts and circumstances are such as to bring the cause within the doctrine of "last clear chance." Without entering upon a further analysis of the facts, they are not such as to invoke this doctrine.

Appellees insist that the peremptory instruction has not been properly brought into the record, and by reason of this infirmity the error predicated upon the giving of the same can not be considered.

The conclusion we have reached makes it unnecessary to pass upon this question.

Finding no available error in the record, in favor of appellant, judgment is affirmed.

NOTE.—Reported in 111 N. E. 201. As to care required to avoid collision on highway, see 48 Am. St. 372. On the rule of the road governing vehicles proceeding in the same direction, see 41 L. R. A. (N. S.) 337; Ann. Cas. 1913 A 833. See, also, under (1) 29 Cyc 525, 627; (2) 38 Cyc 1571; (3) 37 Cyc 274, 279.

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JULIAN v. JULIAN.

[No. 8,820. Filed January 26, 1916.]

1. DIVORCE.—*Custody and Support of Children.—Modification of Degree.—Jurisdiction.—Charge of Venue.*—Under §1084 Burns 1914, §1046 R. S. 1881, authorizing the court in granting a divorce to make provision for the guardianship, custody, support and education of the minor children of such marriage, the jurisdiction of the court, in so far as the welfare of the children is concerned, continues until they become of age, so that notwithstanding §422 Burns 1914, §412 R. S. 1881, authorizing changes of venue in civil cases, there can be no change of venue from the court having such jurisdiction in a proceeding to modify the decree in relation to the custody and support of children. pp. 522, 524.
2. DIVORCE.—*Finality of Decree.—Custody and Support of Children.—Change of Venue.*—While there may be a change of venue from the county in divorce proceedings where the object of the proceedings is to secure a divorce, or settle property rights or alimony, the judgment decreeing a divorce, adjudicating the property rights and providing for alimony, is final and can be attacked only on appeal for error occurring at the trial, and the right to a change of venue does not extend to subsequent proceedings affecting the decree in relation to custody and support of children of the parties. p. 524.
3. DIVORCE.—*Custody and Support of Children.—Modification of Degree.—Knowledge of Parties.*—Parties submitting to the jurisdiction of a court in a divorce proceeding are chargeable with knowledge of the fact that such court will make such order for the support of their minor children as the condition of the parties may then warrant, that as such conditions may thereafter change the order on proper motion will be modified accordingly, and that the jurisdiction with respect to all such motions will continue in such court. p. 524.

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4. **DIVORCE.—Custody and Support of Children.—Modification of Decree.**—While an order modifying a divorce decree with respect to its provision for the custody and support of minor children, should be based on the subsequent conduct and changed conditions of the parties, the welfare of the children is the controlling consideration, and the pecuniary ability of the father must also be considered. p. 525.
5. **DIVORCE.—Custody and Support of Children.—Modification of Decree.—Evidence.**—On evidence showing that the health of a party charged with the support of minor children under a divorce decree was not as good as at the time the decree was rendered, and that his work was more arduous, and in view of the inferences the court was warranted in drawing therefrom, its order modifying the decree by reducing the weekly amounts the party was required to pay could not be disturbed. p. 525.

From Hancock Circuit Court; *Robert Williamson*, Special Judge.

Action by Orange S. Julian against Mary M. Julian. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

*Charles H. Cook, Jonas P. Walker and Robert L. Mason* for appellant.

*Thomas E. Glascock and Omer S. Jackson*, for appellee.

**IBACH, C. J.**—This is an action by appellee against appellant to change and modify the judgment and decree of the Hancock Circuit Court divorcing them, upon appellee's application for divorce. In the divorce decree, the court awarded the three minor children of the parties to appellant and ordered appellee to pay her, for the support of the children, fifteen dollars per week till the oldest child became eighteen years of age, ten dollars per week until the next child became eighteen years of age, and five dollars per week until the youngest child became eighteen years of age, and appellee filed this motion now under consideration in order to have the decree changed and modified by a re-

duction of the sums of money which he was to pay for the support of the children.

Appellee in substance alleged in his verified motion to modify the judgment that he was a mail clerk in the United States railway mail service, that since the rendition of the decree complained of his duties had been increased, that he had been in ill health, and was gradually growing worse, which incapacitated him in part for his work, and necessitated his taking medicine often, and securing medical attention, and that his necessary living expenses, combined with the amount required to be paid to appellant for the support of his children, consume all of his earnings, that his ill health is such that he will be required to discontinue working at full time; in short, that to pay the amounts imposed by the decree is such a tax on his health and earning capacity as to jeopardize his health and future earning capacity, and threatens to destroy his health entirely. He avers that the eldest son is now sixteen years old, in good health, weighs 130 pounds, and is able to do much towards his own maintenance. He asks that the decree be modified so as to meet the conditions set forth in his petition, and so that he will be required to pay for the support of the oldest son two dollars per week, and for the two youngest children four dollars per week each until they each arrive at the age of eighteen years. After hearing evidence the court sustained the motion and granted the modification of the decree as prayed.

The first question for our consideration is whether, when on appellant's affidavit for change of venue, the venue of the cause was changed to the

1. Shelby Circuit Court, that court erred in striking the cause from the docket on motion of appellee, and in certifying it back to the Hancock Circuit Court, over appellant's objection and

exception, and whether the Hancock Circuit Court erred in taking jurisdiction of the cause when certified back. Appellant urges that the right to a change of venue in this case is granted by §422 Burns 1914, §412 R. S. 1881, that this is a "civil action", within the meaning of the statute, and the affidavit of appellant for change of venue was sufficient; that as the act relating to divorce proceedings makes no provision for a change of venue from the county, the general rules as to civil actions apply, citing *Evans v. Evans* (1886), 105 Ind. 204, 5 N. E. 24, 768; and *Joseph v. Schnepfer* (1890), 1 Ind. App. 154, 27 N. E. 305. However, it is provided by statute, §1084 Burns 1914, §1046 R. S. 1881, that the court in granting a "divorce, shall make provision for the guardianship, custody, support and education of the minor children of such marriage," and it is held that this jurisdiction of such court continues until such children become of age. In the case of *Stone v. Stone* (1902), 158 Ind. 628, 64 N. E. 86, it was said, and quoted with approval in *Keesling v. Keesling* (1908), 42 Ind. App. 361, 85 N. E. 837, "Since the organization of our State government it has been the established policy of the law to regard the minor children of divorced parents as wards of the court in the same general way that minor children of deceased parents are regarded. The nurture and proper training of such children are subjects of vital interest to the State, as well as to the children themselves, and when the family has thus been broken up, and the children taken to other homes and exposed to the mutual animosities and jealousies of their parents, and their happiness and usefulness as citizens endangered, the court granting the divorce must be deemed to have full and continuing jurisdiction, during the minority of such children, to make from time to time such or-



ders and modifications thereof, with respect to their care, custody, and control, as are deemed expedient; the interests of society and welfare of the children, in all such inquiries, being the paramount and controlling consideration. \* \* \* The statute of 1852 expressly confers upon the court granting the divorce jurisdiction over the nurture, custody, and training of the minor children. This jurisdiction applies to the state of minority, and may be exercised in the same case at any time within that period. The fact that the court has rendered judgment upon one state of facts, and disposed of the children as their best interests then required, does not impair the power of the court to decide upon another state of facts, subsequently arising, which affect their welfare."

In other than divorce proceedings, judgments, orders and decrees, after the close of the term of court, are final. *Cauthorn v. Bierhaus* (1909), 44 Ind. App.

362, 88 N. E. 314. In divorce proceedings,

2. the judgment decreeing the divorce, and adjudicating the property rights, and providing for alimony, is final and can only be at-
1. tacked on appeal for error occurring at the trial. Motions to modify, such as we have here, are governed by the divorce law. There
3. may be a change of venue from the county in divorce proceedings where the object of the proceedings is to secure a divorce, or settle property rights or alimony. *Evans v. Evans, supra*. But when a court makes an order concerning the custody, care and control of minor children, under the authority of §1084 Burns 1914, *supra*, that court continues its jurisdiction of such children until they come of age, and with such jurisdiction may change its order, or make new orders, if the welfare of the children requires it. A change of venue

from the jurisdiction of such court over such children is not provided for, and is not contemplated, and is in effect denied by the provision of the statute for continuing jurisdiction. When the parties to the divorce proceeding submitted themselves to the jurisdiction of the Hancock Circuit Court they are charged with knowledge of the fact that the court would make such order for the support of the minor children as the conditions of the parties then warranted, and that as the conditions might change the court would on proper motion make such order as the changed conditions would justify and once having submitted themselves to the jurisdiction of such court, that jurisdiction continued with reference to all such motions as the one under consideration. There was no right to a change of venue from the county in the present case, and the Hancock Circuit Court had jurisdiction of the motion. See *Hopkins v. Hopkins* (1876), 40 Wis. 462; *Bacon v. Bacon* (1874), 34 Wis. 594, as generally supporting our holding.

The next question arises under the motion for new trial, and is as to whether the evidence shows such a changed condition as to support the modification allowed. "Whatever modification is made in the

order of the court as to the care, custody,  
4. and nursing of the minor child or children must be based upon the conduct or changed circumstances of the parties subsequent to

5. the order made in the divorce case." *Tobin v. Tobin* (1902), 29 Ind. App. 382, 64 N. E.

624. The welfare of the children is the controlling consideration. *Stone v. Stone, supra*. The pecuniary ability of the father is also an element to consider. *Cox v. Cox* (1865), 25 Ind. 303. There was evidence substantially supporting the averments of appellee's motion to modify. This tended to show

that appellee's health was not as good as at the time the decree was granted, and that his work was more arduous. The court might have inferred therefrom that the payment of the amount decreed imposed on him such a heavy burden that in meeting it he was endangering his future earning capacity, and that if such burden were continued, his earning capacity might be destroyed, and he would then be unable to contribute anything to the support of his children. With this view, we can not say that the court erred in rendering its decree modifying the original order, or that its decision was not supported by the evidence. Judgment affirmed.

NOTE.—Reported in 111 N. E. 196. As to who has the right to the custody of the children, see 2 Am. St. 183. On the father's liability for support of children as affected by decree awarding custody to mother, see 2 L. R. A. (N. S.) 851. See, also, under (1) 14 Cyc 810; 40 Cyc 120, 121; (3) 14 Cyc 810, 813; (4) 14 Cyc 811, 813.

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### HUFFMAN, GUARDIAN, ET AL. v. RICKETS.

[No. 8,827. Filed January 26, 1916.]

1. CANCELLATION OF INSTRUMENTS.—*Deed Given for Future Support.—Complaint.—Sufficiency.*—A complaint to cancel a deed executed to a husband and wife in consideration of conditions subsequent for the grantor's support, alleging that one of the grantees was dead and the other insane, and that no person representing the surviving grantee furnished the required support to grantor, was not insufficient notwithstanding it did not allege that the failure of defendants to furnish the support was due to fraud or bad faith or induced by a wilful intention to disregard the conditions of the deed. p. 529.
2. DEEDS.—*Conditions.—Conveyance in Consideration of Support.—Construction.—Enforcement.*—Contracts by which aged and infirm persons convey property to others in consideration of an agreement for support are in a class to themselves with reference to their interpretation and enforcement, and, being regarded as imposing personal obligations which are nondelegable except with the consent of the grantor, will be enforced without reference to the form or phraseology of the writing by which they are expressed, or whether by the strict letter of the law a forfeiture is expressly provided for. p. 532.

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3. **DEEDS.**—*Consideration.*—*Future Support.*—*Conditions Subsequent.*—A grant of lands in consideration of an agreement for the future support of the grantor, in the absence of a stipulation to the contrary, creates in the grantee an estate on condition subsequent. p. 533.
4. **DEEDS.**—*Construction.*—*Consideration.*—*Future Support.*—*Conditions Subsequent.*—A deed conveying land to a husband and wife subject to the condition that grantees are to maintain and care for grantor for her natural life, and providing that if grantees fail or refuse to comply with the condition in a reasonable manner the deed shall at once become null and void, created an estate on condition subsequent, for a breach of which the estate became forfeited and could be recovered. p. 533.
5. **DEEDS.**—*Consideration.*—*Future Support.*—*Breach of Condition.*—*Enforcement of Forfeiture.*—In the absence of any waiver or countervailing right, courts of equity have jurisdiction to render effective a forfeiture growing out of the breach of a condition subsequent for the care and support of a grantor by a cancellation of the instrument, and the real basis of such equitable jurisdiction is the situation of the grantor rather than that of the grantee. p. 534.
6. **DEEDS.**—*Consideration.*—*Future Support.*—*Breach of Condition.*—*Impossibility of Performance.*—A grantor is not precluded from obtaining a decree cancelling a deed made to a husband and wife on a condition subsequent for grantor's care and support, where one of the grantees dies and the other becomes insane, thus rendering performance by them impossible, either upon the theory that such impossibility is produced by an act of God, or that it vests the estate in the surviving grantee freed from the condition, or that grantor may be required to accept performance from the personal representatives of the grantees. pp. 536, 541.
7. **DEEDS.**—*Consideration.*—*Future Support.*—*Rescission.*—*Fraud.*—The rule that in cases where conveyances are made on the mere agreement to support as the consideration therefor, as distinguished from a conveyance made on such an agreement as a condition subsequent, the conveyance may be rescinded only when from the circumstances attending the failure to perform it may be inferred that grantee never intended to perform and that consequently the contract on his part was fraudulent from its inception, does not prevail in this State. p. 541.
8. **CANCELLATION OF INSTRUMENTS.**—*Deed Given for Support.*—*Demand for Performance.*—*Necessity.*—Where a grantor conveyed to a husband and wife on condition subsequent for the care and support of grantor, and the condition was thereafter rendered impossible of performance by the death of one of the grantees and the insanity of the other, the grantor was not required to make a demand for performance of the condition before suing to cancel the deed. p. 544.

9. **DEEDS.**—*Consideration.*—*Support.*—*Breach of Condition.*—*Termination of Estate.*—Where the surviving grantee in a deed made on condition subsequent for the care and support of grantor, became incapable of performing by reason of insanity, such fact did not of itself terminate the estate, but rendered it susceptible to determination by some act of the grantor equivalent to a reëntry at common law. p. 546.
10. **DEEDS.**—*Conditions Subsequent.*—*Breach.*—*Termination of Estate.*—*Reëntry.*—*Sufficiency.*—Where the surviving grantee in a deed made on condition subsequent for the care and support of grantor, became unable to perform by reason of insanity, his guardian had no power to deliver possession or reconvey for condition broken, so that the act of grantor plainly indicating to such guardian that she did not waive the breach of the condition, and that she claimed the lands as her own, was under the circumstances the equivalent of a sufficient reëntry. p. 546.

From Wells Circuit Court; *Wm. H. Eichhorn*, Judge.

Action by Nancy Rickets against Samuel H. Huffman, guardian of Cyrus F. Rickets, and another. From a judgment for plaintiff, this appeal is prosecuted. *Affirmed.*

*L. B. Simmons* and *Simmons & Dailey*, for appellants.

*John A. Bonham* and *Edwin C. Vaughn*, for appellee.

CALDWELL, J.—This action, commenced in the Blackford Circuit Court, was venued to the Wells Circuit Court and there tried. Appellee, by her complaint, sought to procure the cancelation of a deed of warranty executed by her August 17, 1911, to her son, the appellant, Cyrus F. Rickets, and Margaret Rickets, husband and wife. Her action is based on the alleged breach of conditions subsequent for her support and maintenance contained in the deed. A trial by the court resulted in a judgment and decree canceling the deed as prayed. The errors assigned and not waived are based on the overruling of the demurrer to the complaint and the

overruling of the motion for a new trial. Under the latter assignment, the question of the sufficiency of the evidence is presented.

Three points to the following effect are urged against the sufficiency of the complaint: (1) That Margaret Rickets having died, and Cyrus F. Rickets having become incurably insane, the condition subsequent contained in the deed is impossible of performance by reason of the acts of God, and the demurrer should have been sustained; (2) that the complaint is insufficient by reason of the absence of an allegation that the guardian, after his appointment and the children of Cyrus F. Rickets, after he became insane, failed to support and maintain appellee; (3) there being no allegation of fraud or bad faith on the part of either grantee to the deed or of appellant Huffman, or of a wilful intention not to comply with the conditions of the deed, appellee is not entitled to the equitable relief demanded, and the demurrer should have been sustained.

The complaint to the extent necessary to a proper consideration of the objections urged against it, is to the following effect: On August 17,

1. 1911, appellee was a widow more than eighty years of age, in poor health, and owned in fee a described tract of land in Blackford County, containing 49 acres, on the income from which she was dependent for her support. On that day she executed a warranty deed by which she conveyed the tract to appellant Rickets and wife. A copy of the deed is embodied in the complaint, its material provisions being as follows:

“This indenture witnesseth that Nancy Rickets, unmarried \* \* \* convey and warrant to Cyrus F. Rickets and Margaret

Rickets, husband and wife \* \* \* for and in consideration of \$4,000, the receipt whereof, is hereby acknowledged, the following described real estate in Blackford County, in the State of Indiana (describing it), subject to the conditions hereinafter set out. Grantees hereby agree to maintain and care for grantor for her natural life in manner suited to her station in life, as she may reasonably require, and pay all expenses incident to such maintenance and care, except for clothing of grantor. If grantees herein shall fail or refuse to comply with the above conditions in a reasonable manner, then this deed shall at once become null and void. \* \* \* ”

It is alleged that Cyrus F. Rickets and his wife accepted the deed, and thereupon entered into possession of the lands thereunder, and that the grantees thereafter controlled, managed and cultivated the lands, and appropriated the crops therefrom. It is also alleged that the money consideration named in the deed was not paid or intended to be paid, and that the sole consideration for the execution of the deed was the provision for care and support.

As bearing on the first objection urged against its sufficiency, the complaint discloses that Margaret Rickets died soon after the execution of the deed, and that Cyrus F. Rickets as surviving tenant by the entirety thereby became the sole owner of the title conveyed by the deed, and that thereafter in March, 1912, he became violently, permanently and incurably insane, and that he at that time was confined in the hospital for the insane at Richmond, where he remains.

As bearing on the second objection urged, the complaint alleges in substance that under appointment made by the Blackford Circuit Court at the



June term, 1912, appellant Huffman is the guardian of appellant Rickets as an insane person; that appellants have continued to cultivate the lands and appropriate the proceeds for their own purposes, and that since March, 1912, neither appellant, nor any person for them or either of them has complied with the conditions contained in the deed; that they have failed and refused and still fail and refuse to furnish anything for appellee's support, or to maintain or care for her or to pay any of the expense thereof, or to deliver to her any of the rents and profits from the tract of land; that appellee has been compelled to and has received from other persons and other relatives all support, maintenance and care that she has received since March, 1912, such persons being under no obligations to support her without compensation.

As to the third objection urged, there is no allegation in the complaint that appellants, Rickets and Huffman, guardian, in their failure to support and maintain appellee were actuated by fraud or bad faith, or that such failure was induced by a wilful intention to disregard the conditions of the deed. In the absence of an allegation to the contrary, it will be presumed that until Margaret Rickets died, the grantees to the deed faithfully performed its covenants, and that appellant Rickets, the surviving grantee, thereafter up until some time in March, 1912, continued to do so. Since that time, however, for reasons made obvious by the complaint, there has been a total failure on the part of the grantees personally to perform such covenants. If it were allowable for persons other than grantees thereafter in their behalf to perform such covenants, in the absence of appellee's consent thereto, it sufficiently appears from the complaint that no other persons representing grantees did so. From that time appellee

was supported, maintained and cared for by persons under no legal obligations to do so, and prompted by motives other than those growing out of some relation of privity to grantees. It, therefore, follows that the second objection to the complaint is untenable. We proceed to a consideration of the first and third objections.

Contracts by which aged and infirm persons convey all or a substantial part of their property to others in consideration of an agreement for

2. support, maintenance and care during their declining years, are with practical uniformity recognized by the courts as constituting a class by themselves in matters pertaining to their interpretation and enforcement. "There is in such transactions an element of confidence reposed by the old people in their grantee, sacred in its nature, a breach of which, and retention of the benefits, no court should tolerate by a refinement upon technical rules and principles of law. By the modern trend of authority these transactions are placed in a class by themselves, and enforced without reference to the form or phraseology of the writing by which they are expressed, or whether by the strict letter of the law a forfeiture of the estate is expressly provided for." *Bruer v. Bruer* (1909), 109 Minn. 260; 123 N. W. 813, 28 L. R. A. (N. S.) 608. See, also, *Brady v. Gregory* (1912), 49 Ind. App. 355, 366, 97 N. E. 452; *Cree v. Sherfy* (1894), 138 Ind. 354, 37 N. E. 787; *Bogie v. Bogie* (1876), 41 Wis. 209. The grantee to such a conveyance is usually a child, a near relative, a close friend, or other person in whom the grantor has such confidence that he is willing to entrust to him the peace and comfort of his last days. A conveyance is made to such a person by reason of a desire to have that person, rather than another, support and care for the grant-

or, and hence courts interpret such a contract as imposing on the grantee a personal obligation not delegable or assignable to another without the consent of the grantor. The deed here was made to a son and his wife, and its language to the effect that the grantees thereby agreed to maintain and care for appellee imports such a personal obligation. *Cree v. Sherfy*, *supra*; *Lindsay v. Glass* (1889), 119 Ind. 301, 21 N. E. 897; *Glocke v. Glocke* (1902), 113 Wis. 303, 89 N. W. 118, 57 L. R. A. 458. *Thomas v. Thomas* (1893), 24 Or. 251, 33 Pac. 565; *Eastman v. Batchelder* (1858), 36 N. H. 141, 72 Am. Dec. 295; 2 Devlin, Deeds (3d ed.) §859; 6 R. C. L. 817; 13 Cyc 695

It seems to be the settled rule in this jurisdiction that a grant of lands in consideration of an agreement for the future support of the grantor,

3. in the absence of a stipulation to the contrary, creates in the grantee an estate on condition subsequent. *Cree v. Sherfy*, *supra*; *Tomlinson v. Tomlinson* (1904), 162 Ind. 530, 70 N. E. 881; *Brady v. Gregory*, *supra*; *Richter v. Richter* (1887), 111 Ind. 456, 12 N. E. 698; *Hefner v. Yount* (1847), 8 Blackf. 455. The rule, although not universal, prevails in most other jurisdictions. *Blake v. Blake* (1882), 56 Wis. 392, 14 N. W. 173; *Mansfield v. Mansfield* (1892), 92 Mich. 112, 52 N. W. 290; *Glocke v. Glocke*, *supra*; *Mash v. Bloom* (1907), 133 Wis. 646, 114 N. W. 457, 14 L. R. A. (N. S.) 1187, 14 Ann. Cas. 1012. The deed here, by its express terms, creates an estate on condition sub-

4. sequent, in that it provides that on a failure or refusal to comply with the covenants of the deed, it shall at once become null and void. *Van Horn v. Mercer* (1902), 29 Ind. App. 277, 283, 64 N. E. 531; *Barker v. Cobb* (1858), 36 N. H. 344. In *Hershman v. Hershman* (1878), 63 Ind. 451, 457,

it is announced as a general and undisputed proposition, in a case such as this, that "Upon failure to perform the condition subsequent, the estate conveyed on such conditions or condition became forfeited, and might be recovered by the grantor." In *Lindsay v. Glass*, *supra*, the following language is used: "For the protection of persons who thus dispose of their property, courts are inclined to treat the transfer or conveyance, so long as the contract for support remains executory, as having been made upon the condition subsequent that the promise to furnish care and maintenance shall be fully and fairly performed. \* \* \* Until the contract is fully performed on both sides, it is liable to be rescinded and the property reclaimed, leaving the parties to their remedies, respectively, for what may have been furnished under the contract." See, also, *Leach v. Leach* (1853), 4 Ind. 628, 58 Am. Dec. 642; *Hefner v. Yount*, *supra*; *Cree v. Sherfy*, *supra*; *Richter v. Richter*, *supra*.

In the case at bar, after March, 1912, under the averments of the complaint, there was a total failure to perform the condition subject to

5. which the deed was executed. The performance of such condition constituted a continuing and fixed duty. *Van Horn v. Mercer*, *supra*. Under what seems to us to be the general trend of the decisions in cases of the nature of this, and in the absence of a waiver or of any countervailing right, courts of equity have jurisdiction to render effective a forfeiture growing out of a total or substantial breach of the condition, by canceling the instruments that form the muniments of title in the grantee. Since the grantor in such a case contracts for care and support at the hands of a designated person, rather than for such care and support generally, the exercise of such jurisdiction is sometimes

justified on the theory that any remedy at law is inadequate, and that damages otherwise recoverable would be speculative and conjectural. *Reeder v. Reeder* (1890), 89 Ky. 529, 12 S. W. 1063; or that the neglect or refusal to perform constitutes such a failure of consideration as entitles the grantor to be restored to his original condition. *Haataja v. Saarenpas* (1912), 118 Minn. 255, 136 N. W. 871, or that the grantee holds the property in effect in trust to carry out the obligation assumed, and that his failure or refusal to do so constitutes such a violation of the trust as amounts to a fraud by reason of which the grantor may regain his property (*Diggins v. Doherty* [1885], 4 Mack. 172; *Barnes v. Barnes* [1892], 9 Mack. 479), or by reason of actual fraud at the inception of the contract (*Sherrin v. Flinn* [1900], 155 Ind. 422, 58 N. E. 549), or that the refusal to perform raises a presumption of fraud at the inception of the contract. *Stebbins v. Petty* (1904), 209 Ill. 291, 70 N. E. 673, 101 Am. St. 243. The grantor, usually aged and infirm, parts with his property in the full hope and expectation that he will receive tender care and ample support at the hands of the ones selected by him under the promptings of a trust and confidence reposed. He contracts to receive such care from that sort of a person. Through no fault of his own, circumstances intervene to the frustration of his hope and the defeat of his expectations. His property, in effect set apart to procure his own maintenance, and usually regardless of its comparative value, is in the hands of another. For some reason beyond his own control, he fails to receive the care and support for which he contracted, and being stripped of his substance, he can not use it to that end. To procure support, he is relegated to the charity of those bound to him by no legal obligation. An examination of the decisions

convinces us that it is the situation of the grantor thus presented, rather than that of the grantee that forms the real basis for the exercise of equitable jurisdiction to restore to him his property at his election on such terms as good conscience may demand. In *Glocke v. Glocke, supra*, the following language is used: "by repeated decisions of this and other courts, the law has been firmly established that where a son obtains title and possession of his father's property, giving as a consideration therefor his promise to support the grantor for life, such promise, whether the manner in which it is to be kept be definitely specified in the writing or not, is not delegable; that the property conveyed is held on condition subsequent; that for a breach thereof the title thereto will, at the election of the grantor, no sufficient equitable considerations to the contrary standing in the way, revert without judicial aid, the same as in any other case of breach of condition subsequent; and that the grantor may have the aid of a court of equity for such appropriate relief as may be necessary to judicially establish his status as regards the property and quiet his title thereto, removing any adverse claim or outstanding paper in regard thereto that may exist, which might be used, presently or in the future prejudicially to him."

In the case at bar, as we have said, it is not alleged in the complaint that Cyrus F. Rickets and his wife, prior to the decease of the latter, or

6. that the former up to the time in March, 1912, when he became insane, failed in any particular to perform the conditions required by the deed. It will, therefore, as indicated, be presumed that the obligation assumed was faithfully discharged up to that time. Thereafter, however, the failure was total and absolute, due to the fact that

death removed the one grantee from the stage of action, and that the hand of mental affliction rested upon the other. The result in its relation to appellee, however, was the same as if there had been a wilful disregard of the condition in the face of an ability to perform it. Under these circumstances, appellants state three propositions, for each of which they contend in the alternative: (1) That the death of Margaret Rickets rendered joint performance by her and her husband impossible, through the intervention of an act of God, and that as a consequence the latter on the decease of the former took the estate freed from the condition. (2) That Cyrus F. Rickets having become incurably insane after the decease of his wife, performance by them or either of them was rendered impossible, and that the latter therefore on becoming insane took the estate free from the condition; that under the circumstances of either the first or the second proposition "appellee has no remedy, not even a right of support or damages". (3) That equity should assume jurisdiction and carry out the trust originating from the circumstances, otherwise than by enforcing a forfeiture for a breach of condition.

Preliminary to a consideration of the authorities cited by appellants in support of propositions one and two, it is well to observe that the condition became impossible of performance only in the sense that the grantees were rendered incapable. Appellee remained in being, her necessities have not diminished, and the lands which she conveyed to the end that she might be cared for and maintained are yet in existence and within the jurisdiction of the court. In each of the following cases cited by appellants, it is held that as the act of God or of the grantor or of the law rendered impossible of performance a condition subsequent, the estate of the grantee



became absolute when the impossibility of performance arose: *Davis v. Gray* (1872), 16 Wall. 203, 21 L. Ed. 447, where the state granted the lands, and by its subsequent act rendered the performance of the condition impossible; *Scoville v. McMahon* (1892), 62 Conn. 378, 26 Atl. 479, 36 Am. St. 350, 21 L. R. A. 58, where lands were granted to be used for a certain purpose, and that purpose was afterwards prohibited by law; *Morse v. Hayden* (1889), 82 Me. 227, 19 Atl. 443, where lands were devised to testator's wife subject to the condition that she should provide for and maintain testator's son until he reached his majority, and the son died before he reached such age; *Parker v. Parker* (1878), 123 Mass. 584, where testator devised land to his son subject to a condition that the son support his brother, and the brother died before the decease of the testator; *Jones v. Doe* (1836), 2 Ill. 276, where lands were devised to testator's grandchildren on condition that they reside with the testator's wife, and the wife died; *McLachland v. McLachland* (1842), 9 Paige 533, where testator devised land to his grandson subject to possession in another for eight years, and on condition that the grandson settle and reside on the lands, and the grandson died before the expiration of the eight years; *Merrill v. Emery* (1830), 27 Mass. 507, a legacy to a wife subject to a condition that she educate and bring up testator's granddaughter until she should arrive at the age of eighteen, and the wife died soon after the testator. In the last case it is held that if the condition required only the personal care of the wife, the obligation terminated at her death, and the estate became absolute in her representatives; if maintenance and support were required, the obligation became a charge against the legacy. These decisions we believe to be fairly dis-

tinguishable from the case here, generally, for the reason hereinbefore indicated that the case at bar belongs to a class, the cases composing which are to an extent controlled by their own peculiar rules. Specifically in the Davis case, the default was caused by the grantor's act. In the Scoville case, the right to performance had ceased to exist, as it had become illegal. In the Morse case the beneficiary of the condition having been maintained as long as he lived, its substantial provisions had been accomplished. In the Parker case, a like situation existed; also the Jones case, as the condition was for the benefit of the wife; also the McLachland case, as the condition was for the benefit of the grandson. The Merrill case more nearly approaches the case at bar, there being these substantial distinctions however: the condition was created for the benefit of a third person incapacitated by infancy, to choose proper guardians for her welfare; the will did not create a remainder in the beneficiary to become effectual on breach of condition, and which she might use for her care and support; had the estate been forfeited, the heir was not obligated to perform the condition. It is evident, therefore, that the testator's purpose could best be accomplished by a charge on the legacy.

In support of the foregoing propositions and also of a proposition that if the grantee shall die or become incapacitated to perform the condition for support, it may and should be performed by the administrator, heirs, or representatives, appellant cites also *Cross v. Carson* (1846), 8 Blackf. 138, 44 Am. Dec. 742; *Cree v. Sherfy*, *supra*; *Calkins v. Calkins* (1906), 220 Ill. 111, 77 N. E. 102; *Stebbins v. Petty*, *supra*. In the Cross case, the condition for support subject to which the conveyance was made, as interpreted by the Supreme Court, did not create

an obligation personal to the grantor's son, but the conveyance was to him and his heirs "condition upon his and their" performing it. In the Cree case, the contract for support by its terms, and as construed required the personal services of the grantee, the grantor's son. The grantee having died leaving surviving him a widow and children, the grantor waived the personal nature of the services to be performed, and consented to be cared for by the widow and children, which services they refused to perform. The trial court, at the suit of the grantor, enforced a forfeiture for breach of condition, and the decree was approved by the Supreme Court. The question of the right of the widow and children to perform the condition, the grantor not consenting, or the right of the grantor to enforce a forfeiture on the death of the grantee, the widow and children being ready and willing to perform, was not presented or decided. The following, quoted from the Calkins case, indicates the decision: "Neither can the deed be avoided or set aside for the reason that the grantee has been prevented, by reason of death, from carrying out his contract to furnish support to the grantors during their lifetime, because where, as here, he complied with the contract up to the time of his death, there can be no presumption of fraud on the part of the grantee." The foregoing decision is based on the Stebbins case, *supra*, and the following quotation from the latter is sufficient to indicate that the Illinois decisions are not in harmony with the spirit of our own or with the weight of authority: "In Indiana, as well as in the other states, excepting Illinois, where the courts of last resort have considered contracts of this character, so far as we have been referred to their decisions by appellant, the relief is placed on the theory that the agreement to maintain will be read

into the deed as a condition subsequent, and that the latter instrument will be construed as though the granting portion thereof were followed by words stating that it is made upon condition that the grantee support and maintain the grantor so long as the latter lives. Under such a construction it is apparent that whenever support and maintenance were not furnished to the grantor, no matter what occasioned the default, unless performance was excused by him, he could enforce the condition. We have never so construed these deeds."

It will be observed that the Illinois court is speaking of the rule in that state in cases where conveyances are made on the mere agreement to

7. support as the consideration therefor, rather than of cases where by the express terms of the deed, the conveyance is made on such an

6. agreement as a condition subsequent. In

the former sort of case, the decision last cited states that the conveyance may be rescinded only when from the circumstances attending the failure to perform it may be inferred that the grantee never intended to perform, and that as a consequence the contract on the part of the grantee was fraudulent from its inception. As indicated in the case last cited, such is not the rule in this State, nor is it the rule generally accepted.

In *Payette v. Ferrier* (1899), 20 Wash. 479, 55 Pac. 629, Payette conveyed lands to his daughter and her husband in consideration of an agreement for support. The grantees carried out the agreement for a number of years, and then parted with title, and thereafter both died. Payette brought an action against the administrator and heirs of the deceased daughter and her husband to cancel the conveyance. The court, after stating that the jurisdiction of courts of equity to cancel a deed under

such circumstances, where the grantee fails to support the grantor, and after discussing the effect of the fact that grantees parted with title, used this language: "We think there is also another reason why the plaintiff is entitled to be revested with title. The covenants of the grantees to support and maintain the plaintiff were personal and died with them. The happening of that event put an end to the obligation. \* \* \* Upon principle, the cause does not differ from the one we have just discussed. The right of the parent to a return rests in either case upon the failure of consideration, and inability of his child to render service or perform the condition upon which he was entrusted with the property." See, also, *Payette v. Ferrier* (1903), 31 Wash. 43, 71 Pac. 546.

In *Bishop v. Aldrich* (1880), 48 Wis. 619, 4 N. W. 775, an old man and his wife conveyed their farm to their daughter, Mrs. Carleton, in consideration of an agreement for support. The daughter performed the covenant for four months and then died. The following language used in a suit brought to cancel the deed indicates the scope of the decision: "The covenants of Mrs. Carleton to support and maintain the plaintiffs were not assignable, and died with her. Her death, a few months after the conveyance, put an end to the obligation to maintain the plaintiffs; and, if the conveyance stands, her heirs would take the land conveyed to her \* \* \* without any obligation on their part to perform her covenants. This would be most inequitable. The use of the property may or may not be sufficient to maintain the plaintiffs; but whether it is or not, the principle is the same. The consideration for the conveyance has failed, and, under the circumstances peculiar to cases of this class the conveyance ought to fail with it."

The contract here contemplated as a substantial part of the consideration personal services to be rendered by the grantees. It would seem apparent that on the decease of one grantee and the permanent incapacity of the other, the services contracted for being personal, the grantor could not be compelled to accept performance by their representatives and also that such representatives could not be required to perform, one grantee being deceased and the other incapacitated, as aforesaid. 1 Beach, Contracts §227, note; *Cree v. Sherfy*, *supra*; *Lindsay v. Glass*, *supra*; *Williams v. Butler* (1915), 58 Ind. App. 47, 105 N. E. 387, 107 N. E. 300; *Marvel v. Phillips* (1894), 162 Mass. 399, 38 N. E. 1117, 44 Am. St. 370, 26 L. R. A. 416; *Parker v. Macomber* (1893), 17 R. I. 674, 24 Atl. 464, 16 L. R. A. 858; *Drummond v. Crane* (1893), 159 Mass. 577, 35 N. E. 90, 23 L. R. A. 777, note; *McFarlane v. Allan-Pfeiffer Co.* (1910), 59 Wash. 154, 109 Pac. 604, 28 L. R. A. (N. S.) 314, note, Ann. Cas. 1912 A 1180. Under such circumstances "It is the province of a court of conscience when asked for relief, a right of action having arisen to one of the parties, to place the survivors as nearly in the position relatively they would have occupied, but for the death, as it was possible to do. Act of God inures as excuse and relief to both parties to a contract. If it legally releases the one from executing a work he has undertaken, it equally protects the other from paying for more than has been done." *Cree v. Sherfy*, *supra*, 360.

We are asked, however, in the event that we hold that Cyrus F. Rickets can not retain the lands free from the condition subsequent, to follow *Keister v. Curbine* (1903), 101 Va. 768, 45 S. E. 285. In that case, which presented some features similar to those in the case at bar, the court declined to enforce a

rescission of the deed, but directed that the property be administered by a receiver for the benefit of the infant children of the deceased grantee, subject to the right of the grantor for support therefrom. The special circumstances of that case were controlling the court recognizing as proper in the ordinary case the remedy by rescission and restoration of the grantor to his original status. Here we are bound to hold that a substantial part of the consideration for the execution of the deed was the personal care and attention of grantees. The benefit of that part of the consideration at the hands of the grantees has failed appellee beyond recall, and through no fault of her own. Of living persons with capacity to perform, we should presume that she is best able to determine whose personal services would be most agreeable to her. She can procure such services effectively and of her own selection only by the use of her lands, the title to which should be revested in her, to that end. Neither the complaint nor the evidence, which we shall hereafter briefly consider, shows the existence of a countervailing equity in others sufficiently potent to forbid such a decree. That no injustice may be done, and all parties restored to their original status as nearly as possible, an accounting may be had, in which should be included as one of the items the value of services performed and support furnished. *Cree v. Sherfy, supra*; *Hershman v. Hershman, supra*; *Leach v. Leach, supra*; *Maddox v. Maddox* (1909), 135 Ky. 403, 122 S. W. 201; *Johnson v. Paulson* (1908), 103 Minn. 158, 114 N. W. 739. The court did not err in overruling the demurrer to the complaint.

In our consideration of the complaint, we have disposed of most of the points made respecting

8. the sufficiency of the evidence. The evidence in the main supports the complaint as



hereinbefore abstracted. Specifically there was evidence that when the deed was executed August 17, 1911, Cyrus F. Rickets, his wife, Margaret Rickets, his son, George, and his wife, and two younger sons lived as one family on the lands conveyed. They continued to so live thereafter. Margaret died in October. Cyrus thereafter on a number of occasions expressed his fears as to his ability to care for appellee, and declared that her daughters must perform that service. Cyrus became insane in March, 1912, and was taken to the hospital for the insane. Shortly thereafter appellee went to the home of her daughter, ostensibly on a visit, and shortly returned to the old home, where she remained two weeks with George and his wife, and then returned to her daughter, where she remained. In January, 1913, she fell and fractured her hip, which disabled her to the extent that she was unable to attend the trial. The same winter the house on the lands involved burned, whereupon George and his family moved to Oklahoma, where they remained. Shortly after appellant Huffman was appointed guardian of Cyrus F. Rickets, appellee's son-in-law, at her request asked the guardian what he proposed to do respecting appellee's support. The guardian responded that he did not know. Later, at appellee's request, the son-in-law again called on the guardian, and informed him that appellee thought the land under all the circumstances should be in her name, to be used for her support, as it had been set apart for that purpose, and asked him to convey it back. The guardian responded that the land ought to be in appellee's name, and that he would see what he could do. No steps were taken, however, to reconvey the land. It is urged that the evidence is

insufficient in that it fails to show a demand for the performance of the condition of the deed, and that it also fails to show a reëntry for condition broken. As we have indicated, appellee was not required to accept performance from any other person than Cyrus F. Rickets, his wife being dead. Cyrus was incapacitated either to perform or to entertain a demand to that end. For this reason a demand on him would have been futile. Under such circumstances, a demand for performance was not required. *Cree v. Sherfy, supra; Richter v. Richter, supra; Ellis v. Elkhart Car Works Co. (1884), 97 Ind. 247; Tomlinson v. Tomlinson, supra.*

The mere fact that Cyrus F. Rickets, his wife having died, failed to perform the conditions of the deed would not determine the estate thereby

9. granted, as appellee might have waived the breach. Such fact, however, rendered the estate conveyed susceptible to determination
10. at grantor's election, as indicated by some act equivalent to a reëntry at common law. With us, a demand for possession is equivalent to re-entry. Cyrus F. Rickets was entirely incapacitated to entertain a demand for possession, and likewise to reconvey the premises. The guardian's powers over the real estate of his ward, in so far as concerns its disposition are conferred and limited by statute. Such powers do not include the right to deliver possession or to reconvey for condition broken. §§3017, 3078 Burns 1914, §§2486, 2528 R. S. 1881. Under such circumstances, appellee through her agent, plainly indicated to the guardian as the only person clothed with the semblance of capacity and power that she did not waive the breach of the condition, and that she claimed the lands as her own. Under such circumstances, it is our judgment that the evidence showed the equivalent of a suffi-

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cient reëntry. See the following: *Lindsay v. Lindsay* (1874), 45 Ind. 552; *Clark v. Holton* (1877), 57 Ind. 564; *Van Horn v. Mercer, supra*; *Mash v. Bloom* (1907), 14 L. R. A. (N. S.) 1188, note.

The evidence is sufficient to sustain the decision and the judgment is affirmed.

NOTE.—Reported in 111 N. E. 322. As to the remedy of a grantor in a conveyance given to secure his support on breach of the condition by the grantee, see 12 Ann. Cas. 899. See, also, under (1) 6 Cyc 324; (2) 13 Cyc 690, 695; (3) 13 Cyc 691; (4) 13 Cyc 709, 710; (5) 13 Cyc 710; (6) 13 Cyc 704; (7) 6 Cyc 288; 13 Cyc 710; (8) 13 Cyc 713; (9) 13 Cyc 706; (10) 13 Cyc 712.

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### ROACH v. CUMBERLAND BANK.

[No. 8,928. Filed January 26, 1916.]

1. APPEAL.—*Review.—Record.—Instructions.*—Under §§559, 560 Burns 1914, §§534, 535 R. S. 1881, exceptions to instructions to be effective must be dated preceding the return of the verdict, and under §561 Burns 1914, Acts 1907 p. 652, the exceptions, if taken orally, must be noted on the minutes of the court and appear in the transcript on appeal, while, if taken in writing, the memorandum must be dated and signed by the party or his counsel; hence, where the record disclosed that neither of such methods was followed in taking the exceptions, and no attempt was made to bring the instructions into the record by bill of exceptions, no question was presented on the giving of such instructions. p. 549.
2. APPEAL.—*Record.—Instructions.—Filing Instructions.*—To make the instructions a part of the record under §561 Burns 1914, Acts 1907 p. 652, the record must not only show an order of filing the instructions, but that they were in fact filed. p. 550.
3. APPEAL.—*Review.—Admission of Evidence.*—In an action on notes, the admission in evidence of a note executed by one of the defendants and not involved in the litigation was not erroneous, where the record shows that such defendant admitted his signature thereto and that it was offered in evidence as a part of his cross-examination after he had offered a number of instruments signed by him in support of his plea of *non est factum*. p. 550.
4. APPEAL.—*Questions Reviewable.—Objections to Evidence.*—An objection to evidence on the ground that it is not competent or relevant is too general and indefinite to present any error on the admission of such evidence. p. 551.

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5. **APPEAL.—Review.—Objections to Evidence.**—Reversible error can not be predicated on the admission of evidence over an objection which may be obviated by further evidence, where counsel offering same agree to supply such further evidence and thereafter fail to do so, unless such failure is followed by the objector's motion to strike out the evidence so admitted. p. 551.
6. **APPEAL.—Questions Presented.—Objections to Evidence.—Briefs.**—No question is presented on the admission of evidence where appellant's brief does not disclose what, if any, objection was made to its admission. p. 552.
7. **APPEAL.—Review.—Verdict.**—In an action on a number of notes, a verdict for plaintiff can not be disturbed as not supported by the evidence or as being contrary to law, where there was evidence to show that appellant executed one of the notes sued on, and the amount of the verdict is consistent with a recovery on such note. p. 552.

From Superior Court of Marion County (90,954);  
*Charles J. Orbison*, Judge.

Action by the Cumberland Bank against William J. Roach and others. From a judgment for plaintiff the defendant named appeals. *Affirmed.*

*G. Edgar Turner, Charles W. Miller and Henry M. Dowling*, for appellant.

*Joseph R. Williams, Chalmer Schlosser and Perry E. Bear*, for appellee.

FELT, P. J.—Appellee brought this action against appellant, and Roach-Brown Manufacturing Company and Albert J. Brown, upon nine separate notes alleged to have been given to appellee by the Roach-Brown Manufacturing Company and indorsed by appellant and Albert J. Brown. The case was tried on a complaint of nine paragraphs. Issues were joined by appellant on the first paragraph by *non est factum* and on the second to ninth inclusive, by answer in three paragraphs, one of general denial, one of payment, and a plea of *non est factum*. A trial by jury resulted in a verdict for appellee in the sum of \$907.32. Appellant's motion for a new trial was overruled, judgment was rendered on the verdict and this appeal prayed and granted.

The only error assigned is the ruling on appellant's motion for a new trial. Such motion is based on alleged errors, as follows: The giving of instruction No. 5; the admission in evidence of appellee's exhibits Nos. 11 and 12; error in overruling appellant's objection to certain evidence, the details of which are set out; that the verdict is not sustained by sufficient evidence and is contrary to law.

As to the first alleged ground for a new trial appellee insists that no exception was properly saved to the instruction and therefore, that no re-

1. versible error is shown, if the instruction be erroneous. The record shows that the jury was instructed on December 8, 1913, and the memorandum at the close of instruction No. 5 shows an exception noted by the trial judge on December 30, 1913. There is no attempt to bring the instructions into the record by a bill of exceptions, and it is not clear what section of the statute appellant relies on to make the instructions a part of the record. If reliance is placed on §§559, 560 Burns 1914, §§534, 535 R. S. 1881, to be effective, the exception noted must be dated and the date must precede the return of the verdict. Ewbank's Manual §§28, 28a; *Vaughn v. Ferrall* (1877); 57 Ind. 182, 185; *Malott v. Hawkins* (1902), 159 Ind. 127, 128, 63 N. E. 308; *Behymer v. State* (1884), 95 Ind. 140, 142; *Retsek v. Harbart* (1911), 176 Ind. 441, 444, 445, 96 N. E. 386; *Indianapolis, etc., R. Co. v. Ragan* (1909), 171 Ind. 569, 571, 86 N. E. 966. If appellant was proceeding under §561 Burns 1914, Acts 1907 p. 652, he might have taken his exception orally or in writing. If taken orally the exception must be noted on the minutes of the court and such entry must appear in the transcript on appeal. If taken by written memorandum it must be dated and signed by the party or his counsel. Neither of these methods of

taking exceptions has been followed in this case. It is contended that the record shows an order

2. to file the instruction and that by reason thereof the instructions are a part of the record under §561, *supra*. It has been held that an order to file is not sufficient and that to become a part of the record under said section it must appear from the record that the instructions were in fact filed. *Suloj v. Retlaw Mines Co.* (1914), 57 Ind. App. 302, 107 N. E. 18; *Retsek v. Harbart, supra; Indianapolis, etc., R. Co. v. Ragan, supra; Newsom v. Chicago, etc., R. Co.* (1913), 52 Ind. App. 577, 579, 101 N. E. 26; *Thieme & Wagner Brew. Co. v. Kessler* (1911), 47 Ind. App. 284, 94 N. E. 338. It follows that the instructions are not properly in the record and that no question relating thereto is duly presented.

The second ground of appellant's motion for a new trial is expressly waived.

The third ground is predicated on the alleged error in overruling the objection of appellant to the introduction in evidence of appellee's ex-

3. hibit No. 11, which is a note dated September 13, 1909, payable to Thomas E. Day for lumber. Appellant objected on the ground that it was an attempt to impeach appellant on a collateral matter; that the instrument offered has nothing whatever to do with the issues in the case at bar and was executed long prior to any period of time embraced in any matter set out in the complaint; that a witness cannot be impeached upon a collateral matter. Appellant admitted that he had signed the note and it was offered in evidence as a part of his cross-examination. Appellant had offered in evidence a number of instruments signed by him for comparison of his signatures in support of his plea of *non est factum*. The signature being admitted neither of the objections stated is ten-

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able. §528 Burns 1914, §504 R. S. 1881. See, also, *Ashwell v. Miller* (1913), 54 Ind. App. 381, 389, 103 N. E. 37. For the same reason there was no error in admitting in evidence exhibit No. 12.

It is next insisted that the court erred in overruling appellant's objection to the following question asked by appellee of one of its witnesses:

4. "Do you remember how long the note for \$600 ran?" The objection was that the evidence was not competent or relevant, which objection was too general and indefinite to present any error on the ruling of the court. *Huber Mfg. Co. v. Blessing* (1912), 51 Ind. App. 89, 93, 99 N. E. 132, and cases cited. It is also insisted that the court erred in overruling appellant's objection to the following question asked of the same witness:

5. "To whom was the money paid for the \$500 note and the \$600 note that went into the \$1,100 note that you mentioned dated December 26, 1911?" The only objection to this question is that it was not shown that appellant's name was on the note. In reply to this objection counsel for appellee stated that they would show that his name was on it by further evidence, whereupon the court overruled the objection. Where the objection can be obviated by further evidence and counsel state that it will be introduced, it is not error to overrule the objection, and if such connecting evidence is not introduced, a motion must be made to strike out the principal evidence, before error can be predicated on the introduction of such evidence. No such motion was made in this case and therefore in any view of the question the court did not commit reversible error by overruling the objection. *Heady v. Brown* (1898), 151 Ind. 75, 77, 49 N. E. 805, 51 N. E. 85.

A witness was placed on the stand by appellant who testified that he was a banker, had experience



in judging handwriting and was acquainted  
6. with the handwriting of appellant. On cross-examination he was asked some questions concerning alleged signatures of appellant to other instruments shown the witness, and appellant asserts that he was permitted to answer over his objection and exception, but the briefs do not show what, if any, objection was made by appellant to the question, and for this reason no question is duly presented in regard thereto.

Appellant also contends that the verdict of the jury is not sustained by sufficient evidence and is contrary to law. There is evidence tending to

7. show that appellant executed the note for \$800 sued on in the first paragraph of complaint and the amount of the verdict is consistent with a recovery on such note. The evidence tends to support the verdict and this court can not weigh conflicting evidence. Neither can it say on the facts of this case that the verdict is contrary to law.

The case seems to have been fairly tried on its merits and a correct result reached. No intervening error has been pointed out which deprived appellant of any substantial right. *Friebe v. Elder* (1914), 181 Ind. 597, 609, 105 N. E. 151. Judgment affirmed.

NOTE.—Reported in 111 N. E. 320. On the admission of document not otherwise relevant as standard of comparison of handwriting, see 18 L. R. A. (N. S.) 520. Generally on comparison of handwriting, see 62 L. R. A. 817. For a discussion of papers in the record as standards for comparison of handwriting, see 9 Ann. Cas. 451. See, also, under (1) 2 Cyc 1087; 38 Cyc 1769, 1791; (2) 38 Cyc 1769; (3) 38 Cyc 1419; (4) 3 C. J. 818; 38 Cyc 1386; (5) 3 C. J. 824; 38 Cyc 1401; (6) 3 C. J. 1416; 2 Cyc 1015; (7) 3 Cyc 348.

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Continental Nat. Bank v. McClure—60 Ind. App. 553.

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THE CONTINENTAL NATIONAL BANK OF INDIANAPOLIS v. MCCLURE ET AL.

[No. 8,945. Filed January 26, 1916.]

1. **APPEAL.—***Ruling on Motion for New Trial.—Briefs.*—Where appellant's brief does not contain the motion for a new trial or its substance, and discloses no application of any of the points and authorities stated to any particular ground of such motion, no question is presented on alleged error in the overruling of such motion. p. 554.
2. **BANKS AND BANKING.—***Deposits.—Trust Funds.—Restoring to Beneficiary.*—The act of a depositor in depositing a trust fund to his own account does not change the character of such fund, and notwithstanding the fact that it has been converted or mixed with the funds of the trustee, or of those claiming through him, if it has not passed into the hands of parties for value without notice of the trust, and its identity has not been lost, the court will separate same from the other funds with which it has been mingled and restore same to the beneficiary entitled thereto. p. 555.

From Superior Court of Marion County (90,528);  
*Pliny W. Bartholomew*, Judge.

Action by Edward S. McClure and others against the Continental National Bank of Indianapolis. From a judgment for plaintiffs, the defendant appeals. *Affirmed.*

*John W. Holtzman, Lewis A. Coleman and Wm. Gage Hoag*, for appellant.

*James Bingham*, for appellees.

**HOTTEL, J.**—This is an appeal from a judgment in appellees' favor in a suit brought by them to have certain moneys deposited with appellant bank declared a trust fund and for recovery of such fund. It appears from the pleadings and the evidence that appellees were dealers in live stock in the state of Ohio and shipped certain stock to Hayes, Allen & Company, of Indianapolis, who were commission merchants, to be sold on commission by the company. Hayes, Allen & Company sold the stock and deposited the proceeds of the sale in its name in ap-

pellant bank and drew a check in favor of appellees on the bank for the amount of the proceeds of the sale, less the commission of the company. Prior to the time the check was presented for payment Hayes, Allen & Company became insolvent. At that time it was indebted to the bank in the sum of \$2,700, evidenced by promissory note. When the bank learned of the insolvency of Hayes, Allen & Company it credited the balance of the account of the company, \$515.45, on its note which was not then due. Thereafter the check given by Hayes, Allen & Company to appellees was presented for payment and payment was refused by the bank on the grounds that the company did not have funds on deposit in the bank with which to pay the check. The complaint sets out in detail the facts connected with the sale of appellees' stock by Hayes, Allen & Company and the deposit of the money received therefrom in appellant's bank, and avers that appellant had knowledge of all the facts and knew that the money so deposited with it and credited by it on the note was appellees' money. The court found that the sum of \$515.45, which appellant credited on the \$2,700 note held by it against Hayes, Allen & Company was a trust fund, and belonged to appellees. Judgment was rendered in accordance with such finding

Appellant in its brief, under the heading "errors relied on for reversal", specifies but one error, viz., that "the court erred in overruling ap-

1. pellant's motion for new trial". This motion is not set out or further referred to in the brief, nor is the ruling thereon or the exception to such ruling indicated. The grounds of such motion, or the substance thereof, is not set out or indicated in the brief. Under appellant's "Points and Authorities", four propositions are stated and authorities

cited thereunder, which propositions are as follows, viz., “(1) The trial court erred in holding that the sum of \$515.45, being the balance of the account of Hayes, Allen & Company at the time the check of the appellee, McClure, was presented for payment, was a trust fund belonging to appellees. \* \* \*

(2) A bank may set off unmatured notes against deposits belonging to insolvent depositors. \* \* \*

(3) The unpaid balance of a draft of \$250 which was credited to the account of Hayes, Allen & Company by appellant bank should have been deducted from the amount of the judgment rendered against appellant. \* \* \* (4) Appellant bank had the right to refuse payment of appellees’ check for the reason that the balance of Hayes, Allen & Company’s account at the time said check was presented was less than the amount of the check.” Appellant makes no application of any of these propositions to any ground of its motion for new trial, or to any ruling of the trial court on which error is predicated. For the reasons indicated appellant’s briefs present no question for our consideration and a dismissal of the appeal is authorized. *Davis v. Bryant* (1913), 52 Ind. App. 343, 100 N. E. 1062; *Cleveland, etc., R. Co. v. Beard* (1913), 52 Ind. App. 105, 100 N. E. 392; *Palmer v. Beall* (1915), *ante* 208, 110 N. E. 218.

However, it is apparent that the legal propositions above indicated on which appellant relies have no application in this case, if the averments of

2. appellees’ complaint were sustained by the evidence, and our examination of the evidence set out in the respective briefs convinces us that it was sufficient to sustain the decision of the trial court. If the fund in question was a trust fund, its character was not changed by Hayes, Allen & Company depositing it to their own ac-

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count, and where such fund had been converted or mixed with the funds of the trustee, or those claiming through him, but had not passed into the hands of parties for value without notice of the trust and its identity had not been lost the court will separate the trust fund from the other funds with which it has been mingled and restore it to the beneficiary entitled to receive it. *Bundy v. Town of Monticello* (1882), 84 Ind. 119, 128; *Citizens Bank, etc. v. Harrison* (1891), 127 Ind. 128, 26 N. E. 83; *Pearce v. Dill* (1897), 149 Ind. 136, 142, 48 N. E. 788; *Shoppert v. Indiana Nat. Bank* (1908), 41 Ind. App. 474, 477, 83 N. E. 515; *Windstandley v. Second Nat. Bank* (1895), 13 Ind. App. 544, 547, 41 N. E. 956; *Orb v. Coapstick* (1894), 136 Ind. 313, 316, 36 N. E. 278; *Central Nat. Bank v. Connecticut Mut. Life Ins. Co.* (1881), 104 U. S. 54, 26 L. Ed. 693. The judgment below is therefore affirmed.

NOTE.—Reported in 111 N. E. 191. See, also, under (1) 3 C. J. 1420; 2 Cyc 1014; (2) 39 Cyc 536.

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### JOHNSON v. BRADY ET AL.

[No. 8,627. Filed June 15, 1915. Rehearing denied November 2, 1915. Transfer denied January 26, 1916.]

1. APPEAL.—*Questions Reviewable.*—*Motion for New Trial.*—*Affidavits.*—No question is presented on the ground of a motion for new trial challenging the competency of a juror, where neither the affidavits supporting such challenge, nor their substance, is set out in appellant's brief. p. 558.
2. APPEAL.—*Briefs.*—*Sufficiency.*—Though appellant's brief does not set out the evidence in narrative form in strict compliance with Rule 22, clause 5, it will be sufficient to present the question of the sufficiency of the evidence, where it appears that there is a substantial compliance and a good-faith effort at full compliance with such rule. p. 558.
3. MALICIOUS PROSECUTION.—*Action.*—*Essential Elements.*—*Prosecution by Indictment.*—To entitle plaintiff to recover in an action for malicious prosecution, where the prosecution complained of was commenced by indictment, the return of the indictment must be

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shown and it must be made to appear that defendant instigated or procured and caused the return of the indictment, and that the prosecution was without probable cause, was malicious, and was terminated by the discharge of plaintiff. p. 559.

4. **MALICIOUS PROSECUTION.**—*Action for Prosecution by Indictment.*—*Evidence.*—*Sufficiency.*—In an action for malicious prosecution commenced against the plaintiff by grand jury indictment, evidence showing a dispute involving the ownership of corn fodder and that at the time of such dispute defendant threatened to submit the matter to the grand jury, that almost a year thereafter a grand jury investigation was begun which resulted in the indictment of plaintiff for grand larceny, but not showing that defendant had anything to do with actually instituting or beginning the prosecution, or that he had any knowledge that it was to be begun, or that he was in any way voluntarily connected therewith, was insufficient to support a verdict for plaintiff. pp. 559, 564.
5. **MALICIOUS PROSECUTION.**—*Parties.*—*Joint and Several Liability.*—All persons concerned in originating and carrying on a malicious prosecution are jointly and severally liable in an action to recover damages therefor. p. 564
6. **MALICIOUS PROSECUTION.**—*Liability.*—*Procuring Indictment.*—While defendant in an action for malicious prosecution may be liable, though he was not the originator of the proceedings complained of, if he voluntarily participated in and countenanced and approved the prosecution, his mere acquiescence would not make him liable, and it must be shown that he did some affirmative act in connection with such prosecution. p. 564.
7. **APPEAL.**—*Verdict.*—*Evidence to Support.*—A verdict will not be upheld which must rest on mere conjecture or speculation. p. 566.

From Superior Court of Marion County (87,502);  
*Charles J. Orbison*, Judge.

Action by George W. Brady against Franklin P. Johnson and others. From a judgment for plaintiff, the defendant named appeals. *Reversed.*

*Lee Moffett, E. W. Johnson and Myers & Fenton*,  
for appellant.

*Charles T. Hanna and Thomas A. Daily*, for ap-  
pellee.

HOTTEL, J.—Appellee, George W. Brady, brought this action against appellant and his coappellees to recover damages for an alleged malicious prosecution. Appellant assigns several errors, but the rul-

ing on his motion for new trial is the only one discussed in his brief. The only grounds of this motion attempted to be presented are : (1) the verdict is not sustained by sufficient evidence; (2) the verdict is contrary to law; and (3) one of the jurors of the jury which tried the case was incompetent to sit as a juror. Appellant's briefs show that this last ground of his motion was supported by affidavits and that counter affidavits were filed thereto. Neither

1. of these affidavits, nor the substance thereof, is set out in appellant's brief, and hence as to such ground of his motion no question is presented. *Price v. Swartz* (1912), 49 Ind. App. 627, 97 N. E. 938; *Schrader v. Meyer* (1911), 48 Ind. App. 36, 95 N. E. 335; *Taylor v. Schradsky* (1912), 178 Ind. 217, 97 N. E. 790.

It is also very earnestly insisted by appellee, Brady, that appellant, on account of his failure to comply with subd. 5, Rule 22 of this court, has

2. presented no question by the first and second grounds, *supra*, of his motion. While such briefs may be subject to criticism, in that they fail to set out in narrative form the evidence of each particular witness as some of the decisions would seem to indicate is required by the rule relied on, they indicate a good-faith effort to comply with the rules of the court and show such substantial compliance therewith as entitles appellant to a consideration of the sufficiency of the evidence to sustain the verdict. *Geisendorff v. Cobbs* (1911), 47 Ind. App. 573, 94 N. E. 236; *Pittsburgh, etc., R. Co. v. Broderick* (1914), 56 Ind. App. 58, 102 N. E. 887; *Ditton v. Hart* (1911), 175 Ind. 181, 93 N. E. 961; *Nave v. Powell* (1913), 52 Ind. App. 496, 96 N. E. 395.

In actions for malicious prosecution where, as in this case, the prosecution was by indictment, five



elements are essential and must be proven be-

3. fore the plaintiff will be entitled to recover, viz.,

(1) the return of the indictment must be shown; (2) the person charged with such prosecution must have instigated or procured and caused the return of the indictment on which the prosecution proceeded, as hereinafter indicated; (3) such prosecution must have been without probable cause; (4) the prosecution must have been malicious; (5) the prosecution must have terminated in the discharge of the accused. *Sasse v. Rogers* (1907), 40 Ind. App. 197, 199, 81 N. E. 590. See, also, *Bitting v. Ten Eyck* (1882), 82 Ind. 421, 423, 42 Am. Rep. 505; 19 Am. and Eng. Ency. Law (2d ed.) 653.

It is insisted by appellant that in this case there is a total failure of evidence to prove either the second, third or fourth elements, *supra*. We address

4. our inquiry, first, to whether there is any evidence to support the second element. Upon this element, the only evidence disclosed by the record which can be said to throw any light thereon is in substance as follows: Brady, hereinafter referred to as "B." rented from appellant Johnson, hereinafter referred to as "J.", twelve acres of ground for corn. By their contract B. was to furnish the seed and put the ground in corn for one-half of the crop of fodder and corn. B. was to shuck and crib J.'s half and leave the stalks standing in the field. The corn was planted and produced a crop. B. had his part cut up. A week or ten days after B.'s corn was cut up, J. called B. over the phone and wanted B. to cut up his, J.'s, part of the corn. Here the evidence presents a conflict. B. claimed at the trial that when J. called him, he, B., told him he didn't have the time to cut the corn; that J. replied, "Why, B., I will release you from the

shucking of the corn if you will cut it." B. said, "No, sir, I will not do that, it takes five times as long to shuck it out as it does to cut it off the stalk;" that J. said, "Oh, well, you do it." B. said, "Well, I don't know, but I will tell you in a minute." That B. after he spoke to the man standing by the side of him he turned around and said, "If I can get somebody to cut the corn for me, I will cut it for the fodder, but I will not cut it any other way." To this J. replied, "that is all right, B., that is an accommodation to me if you will do it, just go ahead and do that and you can have the fodder. I don't want it. I don't have any use for it." That B. went out next day and got two colored men to cut up the corn and put it in the shock, and called up J.'s house and Mrs. J. answered and he left word with her that he had got two men to cut the corn and that they would be there the next morning. J. testified on the subject of the change of their original contract, substantially as follows: That he called B. up and told him that he had sold the land and the purchaser wanted the field so it could be sown in wheat and grass and that, if B. would cut J.'s share of the corn he would release him from shucking and cribbing it; that B. said he would let him know, and in a few days did call up the house and told Mrs. J. to tell him (J.) that he accepted his proposition.

After this new arrangement between J. and B., viz., in the early part of December, J. contracted with a Mr. Means (hereinafter referred to as M.) to husk and crib the corn out of J.'s part of the fodder in question, it being agreed between J. and M. that M. should have the fodder for his work of husking and cribbing. Pursuant to this arrangement M. husked the fodder and set it up in the field. B. knew this was being done and after it was done sent his em-

ploye, Estay Moran, to haul the fodder away, which was done. B. testified, in substance, that the day before the fodder was hauled away, Moran had been to the field and brought word to B. that some one was hauling this fodder away; that he, B., at once called up J. on the phone and said to him: "Mr. J., are you giving or selling any of the fodder away?" That J. replied, "I am not giving any of it away"; that he, B., then said, "Where did you get any of it?" That J. replied, "One-half of it belongs to me," to which B. replied, "You gave the fodder to me for the cutting of it"; that J. said, "it don't make any difference, for I have given it to another man to shuck it out"; that B. said, "All right, I will show you." According to J.'s testimony, he left for the poultry show at Chicago on December 9, 1910, before M. had completed husking and cribbing the corn, and when he returned on the morning of December 15, the fodder had been all taken away. The next morning M. came over and told him the fodder was gone; that they went to the house, called up B. and he, B., said he had taken the fodder himself. As to this conversation over the phone B. testified that J. said: "B., I will have you before the grand jury and I will make it (the fodder) cost you more than it is worth," and that he replied, "To h—l with you and your grand jury." After this conversation and after B. had taken away all the fodder M. called up B. by phone and asked him what he was going to do about the fodder. B. replied he was going to do nothing about it. A day or so later B. had a conversation with M. and asked him what he meant by calling him up over the phone, and M. replied that he didn't mean anything only he wanted him to pay him, and said, "George (B.), I am going to have my corn and if I can not get it I

am going to start the ball rolling," and B. replied "go ahead." Soon after this conversation M. commenced suit before Squire Howe at Broad Ripple, for damages for conversion of the fodder in question, and on January 13, 1911, recovered a judgment for \$25. At this trial M. was represented by David A. Myers as his attorney whom he had known for a couple of years, and B. appeared in person without an attorney. Myers also appears as one of the attorneys for appellant in the instant case. Mr. and Mrs. J. both testified as witnesses for M. at this trial. An execution was issued on the judgment recovered by M. and the return showed that it was read to B. on February 18, 1911; that he claimed no property; that on July 27, 1911, a levy was made on seven acres of growing corn, and on August 11, 1911, there was a sale of sufficient amount to pay the judgment. This levy was made on instruction from M. Mrs. B. claimed this corn and when the levy was made she informed the constable the corn belonged to her. After this sale M. started to cutting up the corn. Mrs. B. ordered him and the man he employed off the premises and informed them that she owned the corn. Mr. and Mrs. B. threatened to swear out a warrant for the arrest of M. M. got only about a half of a shock of this corn. After the above occurrences M. went to Broad Ripple in September, 1911, to file an affidavit for the arrest of B. Whitehead, the constable, and the squire told him to go before the grand jury. On the next day and in the month of September, 1911, M., in company with Mr. Howe, the justice of the peace, appeared before the grand jury to present a case against B. M. gave the prosecutor the names of Platt Whitehead and J. as witnesses whom he desired to have called. J. and his wife were then out of the State, and they were out of the State from

June, 1911, until the first week in October, 1911, and when they returned to the State J. was served with a subpoena to appear before the grand jury. Thereafter an indictment for grand larceny was returned by the grand jury charging B. with the theft of 105 shocks of fodder, the property of M. The indictment was filed October 20, 1911, and contained the indorsement of the names of Means, Whitehead, Styer, and J. as the State's witnesses. B. was arrested upon this charge October 31, 1911, taken to jail and there confined from 4 p. m. until 11 p. m., at which time he was released on a \$1,000 bond. The case was called for trial in the criminal court on the fifth or sixth of January, 1912. J. was subpoenaed as a witness and testified in behalf of the State. J. testified (in the instant case) that while he and his wife were out of the State they were in Alaska; that during such period he had no knowledge as to what M. had been doing and knew nothing thereof until his return, the first week in October. After Mr. and Mrs. J. returned, B. and his wife, M. and a Mr. Stout, went over to J.'s house. After J. had told them about his trip B. tried to get J. to pay to M. one-half of his expenses, he, B., agreeing to pay the other half. J. declined to do this. B. then made a statement to the effect that J. and Mrs. J. had misrepresented him at the trial before justice Howe. J. told B. that they had discussed that before and he did not care to go over it again and invited him out of the house. Shortly after this occurrence J. appeared before the grand jury as a witness in response to a subpoena to appear, and the indictment was returned on which the criminal prosecution was based. J. testified (in the instant case) that he in no way counseled or approved the proceedings brought by M. before squire Howe, or the grand jury, and M. testified, in effect, that he

himself on his own initiative, started the criminal proceedings.

We are unable to find in this evidence any item thereof or any number of items which, upon any reasonable construction, would justify an in-

5. ference that appellant instigated or was in any way responsible for the instigation of the prosecution here involved. It is true, that in a malicious prosecution all concerned in the originating and carrying it on, are jointly and severally responsible. *Smith v. Graves* (1915), 59 Ind. App. 55, 108 N. E. 168; 1 Cooley, Torts (3d ed.) 342; 19 Am. and Eng. Ency. Law (2d ed.) 692. It is also

true that it is not necessary to prove that the  
6. defendant was the originator of the proceedings complained of. "If he participated *voluntary* in the malicious prosecution, and it was carried on with his countenance and approbation, he will be liable. Some affirmative act on the part of the defendant in connection with the prosecution must, however, be shown. Mere acquiescence therein is not sufficient." 19 Am. and Eng. Ency. Law (2d ed.) 692. See, also, *McClarty v. Bickel* (1913), 155 Ky. 254, 159 S. W. 783, 50 L. R. A. (N. S.) 392; *Louisville, etc., R. Co. v. Stephenson* (1912), 6 Ala. App. 578, 60 South. 490; *Magowan v. Rickey* (1900), 64 N. J. L. 402, 45 Atl. 804; *Hurd v. Shaw* (1858), 20 Ill. 355; *Klug v. McPhee* (1901), 16 Colo. App. 39, 63 Pac. 709; *Chambliss v. Blau* (1899), 127 Ala. 86, 28 South. 602; *Breneman v. West* (1899), 21 Tex. Civ. App. 19, 50 S. W. 471.

The most that can be said from the evidence, *supra*, is that it shows, according to appellee,

Brady's testimony, that on an occasion al-  
4. most a year before the grand jury investigation was begun, appellant expressed an intent to bring appellee before the grand jury. This

item of evidence standing alone does not prove and would not justify an inference that appellant instituted or had anything to do with the return of the indictment on which B. was prosecuted nearly a year later. Such item, in connection with appellant's unexplained presence before the grand jury, and the return of an indictment thereafter, might justify such inference. We have therefore set out substantially all of the evidence affecting such question, not with a view of weighing it, but to show that this item of evidence, when considered with the undisputed facts in connection with appellant's presence before the grand jury, will not authorize the inference. There is not an item of this evidence that shows that he had anything to do with actually instituting or beginning the prosecution which resulted in the return of the indictment on which B. was prosecuted, or that he had any knowledge that it was to be begun, when begun. On the contrary M. expressly assumed responsibility for instituting the investigation before the grand jury and says, in effect, that J. was then out of the State, and J. says that his only connection with the prosecution was his appearance before the grand jury in response to a subpoena. There is not an item of evidence that shows or tends to show that J., in any way, aided or advised, or directed, the prosecution in any manner, or that he was in any way *voluntarily* connected therewith. Under the authorities, *supra*, such voluntary connection must be shown. Mere silent acquiescence is not sufficient. However, it is contended by appellee, Brady, in effect, that the jury had a right to infer that, but for appellant's testimony before the grand jury, the indictment would not have been returned, and that the jury also had a right to believe that such testimony of appellant was false and hence that the in-



dictment was procured by appellant's false testimony before the grand jury.

There is some conflict in the authorities as to whether such evidence is admissible, especially where, as in this case, the complaint contains the general averment only, that the defendant "maliciously and without probable cause" procured and caused the return of the indictment, without averring specifically that the defendant falsely testified before such grand jury, and thereby obtained the return of the indictment. *Henderson v. McGruder* (1912), 49 Ind. App. 682, 687, 98 N. E. 137. See *Brown v. City of Cape Girardeau* (1886), 90 Mo. 377, 2 S. W. 302, 59 Am. Rep. 28; *Wilkerson v. McGhee* (1912), 163 Mo. App. 356, 143 S. W. 1198. Whether such averment in the complaint is necessary to entitle appellee to show appellant's testimony before the grand jury is not important in this case, because not only is the averment absent from the complaint, but the record does not disclose what appellant testified to before the grand jury. The only thing disclosed by the record on this subject is the testimony of the appellant to the effect that he did not testify before such grand jury that appellee stole the fodder in question. It follows that the jury could only speculate, or conjecture, as to what appellant's testimony was before the grand jury, and hence was not warranted in finding that the return of the indictment in question was caused or procured by appellant's false testimony. A verdict will not be upheld which

7. must rest on mere conjecture or speculation.

*Pittsburgh, etc., R. Co. v. Vance* (1915), 58 Ind. App. 1, 108 N. E. 158; *Murphy v. Boston, etc., R. Co.* (1896), 167 Mass. 64, 44 N. E. 1087; *Clare v. New York, etc., R. Co.* (1896), 167 Mass. 39, 44 N. E. 1054. We therefore conclude that as to the sec-

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ond element, *supra*, necessary to entitle appellee to recover, the verdict of the jury is not sustained by sufficient evidence and that for this reason the court below erred in overruling the motion for new trial. The judgment below is therefore reversed with instructions to the trial court to sustain appellant's motion for new trial and for any other proceedings consistent with this opinion.

NOTE.—Reported in 109 N. E. 230. As to basis of right of action for malicious prosecution, see 93 Am. St. 454. See, also, under (1) 3 C. J. 1420; 2 Cyc 1014; (2) 3 C. J. 1418; 2 Cyc Ann. 1013; (3) 26 Cyc 10, 17, 20, 47, 55; (4) 26 Cyc 85; (5) 26 Cyc 68; (6) 26 Cyc 17; (7) 3 Cyc 351.

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THE BLUFFTON AND MARION CONSTRUCTION COMPANY  
v. THE MOORE-MANSFIELD CON-  
STRUCTION COMPANY.

[No. 9,170. Filed June 25, 1915. Rehearing denied November 23, 1915. Transfer denied January 26, 1916.]

ABATEMENT.—*Judgment.*—*Appeal.*—Where on the issues tendered by an answer in abatement the finding is against defendant, and on his refusal to plead over judgment is rendered against him for want of an answer to the merits, the judgment is one from which an appeal will lie, but a judgment that the action "shall not abate and said defendant herein shall plead over to the merits", is not a final judgment and is not within any of the exceptions authorizing appeals from certain interlocutory orders.

From Huntington Circuit Court; *Samuel E. Cook*, Judge.

Action by The Moore-Mansfield Construction Company against The Bluffton and Marion Construction Company. From a judgment for plaintiff on the issue tendered by answer in abatement, the defendant appeals. *Appeal dismissed.*

*Abram Simmons, Charles G. Dailey and John J. Kelley*, for appellant.

*Lesh & Lesh and William A. Ketcham*, for appellee.

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FELT, J.—Appellant filed a plea in abatement to the action of appellee, upon which issues were formed and a trial had thereon before the court, which resulted in a judgment as follows: “The issues being joined, this cause is submitted to the court for trial, on the plea in abatement, without the intervention of the jury. The court having heard the evidence and being fully advised in the premises, finds against the Bluffton and Marion Construction Company, on its plea in abatement and in favor of the plaintiff thereon; that the action in No. 10896 should not abate and said defendant should plead to the merits and that the plaintiff herein should recover its costs herein of the Bluffton and Marion Construction Company. It is therefore ordered and adjudged by the court that the defendant, The Bluffton and Marion Construction Company, plead over, and that the plaintiff recover of the defendant, its costs and charges laid out and expended herein to this time, that said action in No. 10896 shall not abate and said defendant herein shall plead to the merits herein, to which judgment the defendant, the Bluffton and Marion Construction Company, at the time excepts.”

Appellant filed a motion for new trial of the issues formed on the plea in abatement which motion was overruled, whereupon appellant prayed and was granted this appeal.

Appellee has moved to dismiss the appeal on the following grounds: (1) the court has no jurisdiction of the appeal; (2) the judgment from which the appeal was taken is not a final judgment. The motion to dismiss must be sustained for the reason that the judgment from which the appeal was granted is not a final judgment, and is not within any of the exceptions which authorize an appeal from certain interlocutory orders. *Wehmeier v.*

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*Mercantile Banking Co.* (1912), 49 Ind. App. 454, 456, 97 N. E. 558, and cases cited; *Smith v. Graves* (1915), 59 Ind. App. 55, 108 N. E. 168; *Crow v. Evans* (1912), 178 Ind. 661, 662, 100 N. E. 8; *Walther v. State* (1913), 179 Ind. 565, 567, 101 N. E. 1005; *Shedd v. American Maize, etc., Co.* (1910), 175 Ind. 86, 87, 93 N. E. 447; *Goldsmith v. Chipps* (1900), 154 Ind. 28, 55 N. E. 855; *Hooker v. Phillippe* (1901), 26 Ind. App. 501, 503, 60 N. E. 167, and cases cited; §§371, 671, 1392 Burns 1914, §§365, 632 R. S. 1881, Acts 1907 p. 237.

The judgment of the trial court was that the action "shall not abate and said defendant herein shall plead over to the merits" of the suit. Had appellant refused to plead over and upon such refusal the court had rendered judgment against it for want of an answer to the merits of the suit and appellant had appealed from such judgment the appeal would lie, but the record presents no such question, and appellant seeks to sustain the appeal on the ground that the judgment is final within the meaning of the statute which authorizes appeals from all final judgments. Motion sustained, appeal dismissed.

NOTE.—Reported in 109 N. E. 406. See, also, 3 C. J. 494; 2 Cyc 607.

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### JOSE ET AL. v. HUNTER ET AL.

[No. 7,881. Filed November 26, 1913. Rehearing denied January 16, 1914. Transfer denied January 27, 1916.]

1. EXCEPTIONS, BILL OF.—*Contents.—Objections to Pleading.*—An original bill of exceptions provided for by §657 Burns 1908, Acts 1897 p. 244, should contain nothing but the evidence and matters incident thereto, so that no question is presented on an objection to the filing of a supplemental complaint set out in the original bill of exceptions. p. 579.
2. EJECTMENT.—*Burden of Proof.*—In an action for possession of real estate the burden is on the plaintiff to establish by affirmative proof his title and right to possession. p. 580.

3. **EJECTMENT.—Title to Support.**—Plaintiff in an action for possession of real estate must recover on the strength of his own title and not on the weakness of that of his adversary. p. 580.
4. **DEDICATION.—Streets.—Ownership of Fee.**—One having a perfect title to the lots abutting on each side of a street theretofore laid out and dedicated for a street, has title of equal strength and validity to the strip included in the street. p. 581.
5. **EJECTMENT.—Evidence.—Erroneous Description in Deed.**—Where plaintiff sought the recovery of a strip of land on which his lots abutted and which had formerly been a public street, a deed to plaintiff's predecessor in title, showing that the strip had been laid out as a street, was not inadmissible in evidence simply because of an error in the description of the land conveyed and apparent on the face of the deed. p. 581.
6. **EJECTMENT.—Evidence.—Deeds.**—Where plaintiff, who owned the lots abutting on each side of a vacated street, sought to recover possession of the strip formerly included in the street, all the conveyances showing plaintiff's chain of title to the lots back to the original owner who dedicated the strip, as well as any evidence showing or tending to show that the strip was laid out or dedicated for a street, was admissible. p. 582.
7. **DEDICATION.—Vacation.—Reversion to Abutting Owner.**—In order that land embraced in a street which has been vacated may revert to the abutting owners, such land must have been originally laid off or dedicated for a street by those who at the time owned the land abutting on each side thereof. p. 583.
8. **EJECTMENT.—Occupying Claimants.—Evidence.—Admissibility.**—Where defendant in an action for possession of real estate sought by cross-complaint to recover for improvements under the occupying claimant's statute, testimony of defendant offered in support of the cross-complaint to the effect that a certain lawyer advised him that he could obtain complete title by bringing suit, and that he did take the action he was advised to take, was not within the rule that where a state or condition of mind becomes material in giving character to an act, the advice of counsel under the influence of which the act was done is controlling, since it did not relate to the state or condition of defendant's mind at the time he made the improvements, and was properly excluded not only on that ground but also on the ground that it involved the conclusion of the witness. p. 584.
9. **TRIAL.—Objections to Evidence.—Evidence Admissible in Part.**—Where competent and incompetent evidence is blended together and offered as a whole, it is not error to sustain an objection to the whole. p. 586.
10. **EJECTMENT.—Occupying Claimants.—Recovery for Improvements.—Good Faith.—Presumption and Burden of Proof.**—Under §1121 Burns 1908, §1074 R. S. 1881, providing for the recovery by an occupying claimant for taxes and for improvements when made

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in good faith under color of title, the occupying claimant has the burden of proof on the question of good faith, and is aided by the presumption of good faith in so far only that such presumption will determine the question in his favor in the absence of evidence to the contrary sufficient at least to weigh equally with it. p. 586.

11. EJECTMENT.—*Occupying Claimants.—Recovery for Improvements.—Color of Title.—Good Faith.*—Where the findings show color of title in an occupying claimant, such finding, in the absence of anything to the contrary, would give rise to the presumption of good faith in the making of the improvements for which recovery is sought, but a further finding that the improvements were made with full knowledge of the rights of plaintiff is inconsistent with the theory that they were made in good faith. p. 588.

12. EJECTMENT.—*Findings.—Right to Possession.*—In an action in ejectment, a conclusion of law that plaintiffs are the owners in fee simple and are entitled to possession, can not stand where there was no finding that plaintiffs were entitled to the possession of the real estate in controversy, and the omission is not cured by a finding that title “rested” in plaintiffs. pp. 588, 589.

From Superior Court of Marion County (79,933);  
*Pliny W. Bartholomew*, Judge.

Action by Erskine E. Hunter and another against Oscar A. Jose and another. From a judgment for plaintiffs, the defendants appeal. *Reversed.*

*Charles A. Dryer*, for appellants.

*Williams & Schlosser*, for appellees.

HOTTEL, J.—Appellees who are husband and wife, filed their complaint in the court below in two paragraphs. The first paragraph is in the usual form in ejectment and alleged that appellees were the owners in fee simple and entitled to the immediate possession of the following real estate in Marion County, State of Indiana, to wit: “a part of Nicholas Jose’s Second Pleasant Valley Addition to said city, a plat of which addition is recorded in plat book 9, page 103 of the records of the recorder’s office of said county and particularly described as beginning at the northwest corner of lot 32 in said addition, thence running north 40 feet; thence east 139 feet; thence south to the northeast corner of said

lot 32; thence west along the north line of said lot 32, 139 feet to the place of beginning; the ground thus described being designated on said plat as Herman or Hart Street." The second paragraph seeks to quiet title to the same real estate.

Appellants, who are also husband and wife, filed a cross-complaint against appellees, claiming to be the owners and entitled to possession of the same real estate and asking that their title be quieted. Appellant, Oscar A. Jose, filed a second paragraph of cross-complaint in which he, as an occupying claimant under the code, sought to recover for improvements made on said real estate aggregating \$2,350 and taxes paid by him aggregating \$120.

The cause was put at issue by general denial to each paragraph of the complaint, and cross-complaint. There was a trial by the court and after it had begun, appellees, by permission of the court filed a supplemental complaint in which they averred in substance that at the time of the filing of their complaint the real estate described therein was burdened with an easement of a street in favor of the public and citizens of the city of Indianapolis, Indiana, and that by proceedings duly had by the board of public works said easement and street was vacated on August 21, 1907. Thereupon the appellants filed answer in general denial to the first and second paragraphs of appellees' complaint and the supplemental complaint. At the request of the parties, the court made a special finding of facts and stated its conclusions of law thereon. Judgment was rendered for appellees adjudging that they were the owners in fee simple of said real estate and that they recover possession thereof together with \$50 damages, and that the claim of the appellants to said real estate was without right and unfounded and that appellees' title thereto be quieted



and that appellants take nothing by their cross-complaint. From this judgment the appellants appealed and assigned as error: (1) That the court erred in its first, second and third conclusions of law and each of them separately stated upon the special finding of facts. (2) That the court erred in overruling the appellants' motion for new trial.

Appellees contend that the real estate which they seek to recover by this action was, at the time the action was begun, a street known as Herman or Hart Street, lying between two lots in said city, to wit, between lots 13 in Bradley's subdivision, at one time called Reeves' Subdivision, and lot 32 in Jose's Second Pleasant Valley Addition; both of which lots were owned by appellees when this action was brought and each of which abutted on said street. It is admitted by the parties that on August 24, 1857, Joseph F. Wingate was then the owner of the following described real estate: "Part of the W.  $\frac{1}{2}$ , N. E.  $\frac{1}{4}$ , Sec. 18, T. 15 N., R. 4 E., bounded as follows: commencing 5 chs. from N. E. corner of said land, thence West 5 chs., thence South 20.18 chs., thence East 5.14 chs., thence North 20.18 chs., to place of beginning, containing 10 acres." This description includes the strip of real estate in controversy.

The first and second findings are to the effect that Archibald C. Reed in 1821 procured from the United States by entry the 80 acres, of which the ten acres above described is a part and that such 80 acres descended by intermediate conveyances, deeds, wills and descent cast by the statute until in August, 1857, Joseph F. Wingate became the owner of the fee simple title of the ten acres above described. The substance of the remaining findings follows: Through intermediate conveyances from said Wingate the following persons became the respec-

tive owners in fee simple of parts of said ten acres as follows: (3) On November 18, 1867, John B. E. Reid became the owner in fee simple of part of the west half of the northeast quarter of said section eighteen (18), township fifteen (15), range four (4), bounded as follows: Commencing in the center of the public road 10 chains west of the northeast corner of said tract of land, and running thence south 546 feet, thence east 145 feet, thence north 546 feet, thence west 145 feet to the place of beginning. Subject to road on north thereof. (4) On October 12, 1869, George H. Heitkam became the owner in fee simple of that part commencing 5 chains west of the northeast corner of the west half of the northeast quarter of said section eighteen (18), township fifteen (15), range four (4), and running thence west 145 feet to a *forty-foot street*, and thence south along the *east side of said street* 546 feet to another *forty-foot street*, thence east on the north line of said *last named street* 145 feet, thence north 546 feet to the place of beginning; except 30 feet off the north end of the same which is taken up and included in the public highway called the New Bethel gravel road; that the deed from Wingate and all those intermediate and to Heitkam contained the description above set out of the streets on the west and south. (5) On September 26, 1870, Nicholas Jose became the owner in fee simple of part of the west half of the northeast quarter of section eighteen (18), township fifteen (15), range four (4), commencing 586 feet south of a point 5 chains west of the northeast corner of said land, thence west 185 feet, thence north 40 feet, thence west 145 feet, thence south 754 feet, thence east 330 feet, thence north 714 feet to the place of beginning. (6) These tracts just described comprised all of the ten acres acquired by Joseph F. Wingate except the

street referred to in Heitkam's tract. (7) On September 28, 1870, Joseph F. Wingate conveyed by quitclaim deed to Nicholas Jose, John B. E. Reid and George H. Heitkam, then the owners of said ten acres as hereinbefore described, the following described part of said ten acres. A piece of ground laid out and to be used as a street 40 feet in width and 580 feet in depth bounded as follows: being that part of the west half of the northeast quarter of section eighteen (18), township fifteen (15), range four (4), commencing at a point 475 feet west of the northeast corner of section eighteen (18), township fifteen (15), range four (4), and running thence west 40 feet to a point, thence south 586 feet to a point; thence east 185 feet to a point; thence north 40 feet to a point; thence west 145 feet to a point; thence north 546 feet to the place of beginning. That said deed contained an error in describing the location of said streets in omitting the words "The west half of the northeast quarter of" from the description, and said deed was intended to convey the street mentioned in the Heitkam description above. (8) On April 5, 1881, Clarissa J. Reeves who through intermediate conveyances had become the owner in fee simple of the Heitkam tract above described, executed a plat of the same containing 10 lots, which plat was recorded May 9, 1881, in plat book 8, page 17. In this plat the streets on the west and south, being the land described in finding number seven were shown as having been given by J. F. Wingate. (9) On November 5, 1888, Giles S. Bradley, who had become the owner in fee simple of the 10 lots in Clarissa J. Reeves' Subdivision, through intermediate conveyances from her, subdivided the same into 13 lots as shown by plat in plat book 9, page 68. Lot 13 thereof abutting on and along the north side of the street shown on the south of the subdivision

is shown at Nos. 4, 6 and 8 above. (10) On April 6, 1895, the plaintiffs became the owners in fee simple through intermediate conveyances from Giles S. Bradley, of said lot 13 and in them the title now rests. (11) On April 4, 1889, Nicholas Jose, his wife joining, subdivided his tract above described into 35 lots numbered 21 to 55, and designated the subdivision Jose's Second Pleasant Valley Addition to the city of Indianapolis. The plat thereof was approved by the city commissioners and is recorded in plat book 9, at page 103, and shows, as Herman Street, the street mentioned at Nos. 4, 6, 7 and 8 above, on the south side of the Reeves and Bradley subdivision above named in Nos. 8 and 9, lot No. 32 of said Jose's addition abutting on and along the south side of said street. (12) On February 23, 1895, Nicholas Jose and wife conveyed by warranty deed said lot No. 32, named just above, to the plaintiffs and in them the title now rests. This deed was made pursuant to a contract or title bond by which said Jose agreed to convey said lot in fee simple, according to the plat of said addition in book 9, together with all rights and appurtenances thereto, and at the time of said contract of purchase Jose represented such lot 32 to be a corner lot contiguous to and abutting on the south side of said Herman street. (13) On the plat of Jose's Second Pleasant Valley Addition, the street on the west side of the Reeves and Bradley subdivisions is extended through this addition and is shown as Quince Street, and the street on the south of said subdivision is shown as Herman Street. By ordinance of the city of Indianapolis duly passed, approved February 20, 1891, annexing certain territory, these, with all other streets in Jose's said addition which is included in the territory annexed, were made part of the city's system of streets.

By ordinance approved September 26, 1896, the name of Quince Street is changed to Nelson Street, and Herman Street, 'extending from Quince Street east, the first street south of Prospect Street', is changed to Hart Street. (14) A resolution of the board of public works of the city of Indianapolis for the improvement of the sidewalks adopted in 1901, shows Hart Street intersecting Nelson Street and the plans for the work show turnouts, approach walks and cross walks at Hart Street, and said improvement was made and completed in that year in accordance with such plans and said approach walks, turnouts, and cross walks still exist as made and are identical with those at other street crossings. (15) Prior to 1904 this piece of ground was never listed for taxation but was shown on the assessor's plat books as Herman and subsequently Hart Street. (16) On October 5, 1903, a decree was entered by the Superior Court of Marion County in cause No. 65,063 in which the heirs of Nicholas Jose, then deceased, were plaintiffs and the city of Indianapolis alone was defendant, by which the title to Hart Street was attempted to be quieted in said plaintiffs, and in their complaint therein they alleged that on April 4, 1889, Nicholas Jose owned said tract of ground and platted the same as a street of his Second Pleasant Valley Addition. On December 14, 1903, the rest of the heirs conveyed the same by quitclaim deed to the widow and on the same day she conveyed the same by warranty deed to Oscar A. Jose, cross-complainant herein. The plaintiffs herein were not parties to said suit and had no knowledge of it until long after. (17) Prior to 1904 said Herman Street or Hart Street being the identical tract described in plaintiff's complaint was used by the public as a highway to travel between Quince

or Nelson Street to the first alley east. (18) Early in the year 1903, before said cause No. 65,063 was instituted, Oscar A. Jose, defendant, visited the home of plaintiffs and asked them to aid him in procuring the vacation of said Hart Street, but plaintiffs refused and told him lot 32 had been bought by them from his father as a corner lot, that they had paid him more for it because of that fact and that if they wanted Hart Street vacated, they would do it themselves. (19) In March, 1909, defendants began the erection of a double tenement house of ten rooms on said Hart Street, the tract described in plaintiff's complaint. Before the foundation of said house was finished, plaintiffs first became aware of defendant's purpose to build it and at once notified Oscar A. Jose in writing to cease work and remove all material therefrom. (20) Defendants, with full knowledge of the rights of the plaintiffs in and to said tract of ground, and that said Hart Street had not been vacated in June, 1904, built a ten-room tenement house thereon, and have at all times since then held possession of said tract to the exclusion of the plaintiffs. (21) On or about November 22, 1907, the board of public works upon the petition of plaintiffs, vacated said Hart Street, and assessed benefits for said vacation against them. (22) The improvements placed upon said strip of ground are of the value of \$2,350, and the rental value of said double house is \$20 per month; the value of the real estate without the improvements is of the value of \$700; the rental value of the lot without the improvements is ten dollars per year; Oscar A. Jose paid the taxes upon the land and improvements for the years 1904, 1905, 1906 and 1907 in the total sum of \$120. Appellees paid taxes on the property for the year 1908, and the assessment for sewer in Pleasant Run \$13.99, which sums were paid by them

on the 11th day of February, 1910. Defendant Oscar A. Jose has not paid any rent for said lot. He collected the entire rent for said land and improvements for the years above mentioned in the sum of \$1,383, and since the completion of said improvements has paid the total sum of one hundred and twenty-eight dollars (\$128) for repairs and insurance on said property.

On the foregoing facts the court stated its conclusions of law as follows: (1) That the law is with the plaintiffs; that the plaintiffs are the owners in fee simple of the real estate described in plaintiff's complaint and that they are entitled to the possession thereof and to have their title to the same quieted. (2) That the defendants are not entitled to any relief or any judgment in their favor on the cross-complaint herein. (3) That the plaintiffs should recover from the defendants fifty dollars (\$50) damages; that the costs of this action should be taxed against the defendants.

Appellants insist that the trial court erred in permitting appellees to file their supplemental complaint. The transcript does not disclose any

1. record entry showing any objections to the supplemental complaint being filed, nor does it disclose any motion to reject or strike it from the files. Neither paragraph of the original complaint was questioned by demurrer in the trial court, and the sufficiency of such complaint is not questioned by any assignment of error in this court. The only objections of any kind to either the original or supplemental complaint that we have been able to find in the record is an objection to the filing of such complaint set out in the original bill of exceptions containing the evidence which is incorporated in the record. The Supreme Court and this court have expressly held that an original bill of exceptions



provided for by §657 Burns 1914, Acts 1907 p. 244, should contain nothing but the evidence and matters incident thereto. *McCoy v. Able* (1892), 131 Ind. 417, 30 N. E. 528, 31 N. E. 453; *Leach v. Mattix* (1897), 149 Ind. 146, 48 N. E. 791; *Stapf v. State* (1904), 33 Ind. App. 255, 71 N. E. 165.

It follows that on the question of the filing of the supplemental complaint, the appellants are in the same position they would have been if they had made no objections to the filing thereof, and hence are in no position to complain of the ruling of the court which permitted such filing.

Disregarding, for the present, the questions presented by appellants' second paragraph of cross-complaint, we will consider the question of the sufficiency of the evidence to sustain the decision of the court on the issues tendered by the complaint. A great part of the evidence is documentary and is embodied in the findings of fact, the substance of each of which we have set out. Each and all of these findings have some evidence and most of them undisputed evidence for their support. It is insisted by appellants in effect that the evidence does not affirmatively show appellees' title and right to possession, but that the decision of the court and its first conclusion of law rest on the weakness of appellants' title rather than on the strength of appellees' title. Appellants' contention that in an action for possession of real estate the burden

2. is on the plaintiff to establish by affirmative proof his title and right to possession is well settled by the authorities. *Pittsburgh, etc., R. Co. v. O'Brien* (1895), 142 Ind. 218, 222, 41 N. E. 528; *Roots v. Beck* (1887), 109 Ind. 472, 9 N. E. 698. It

is equally well settled that the plaintiff must

3. recover on the strength of his own title and not on the weakness of that of his adversary.

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*Furst v. Satterfield* (1909), 44 Ind. App. 613, 618, 619, 89 N. E. 906, and authorities there cited.

Appellants make their mistake in assuming that appellees' title depends alone on the conveyance of date, September 28, 1870, wherein Joseph F. Wingate conveyed by quitclaim to Jose, Reid,

4. and Heitkam. They do not contend that there is any defect or weakness in appellees' title to the two lots 13 and 32, abutting on the

5. strip of ground in question. The validity and strength of appellees' title to such lots being conceded, it must follow, under the law, that equal validity and strength of title exists in them to the strip of ground in question, if, at the time appellees bought such lots abutting thereon, the said strip of ground was one of the streets of the city of Indianapolis, and provided also, that such strip had been laid out or dedicated as such street, or as a highway, by appellees' remote grantor, Joseph F. Wingate, at a time when he owned and sold the abutting land on either side thereof. The quitclaim deed of September 28, 1870, by Wingate to Jose, Reid and Heitkam was only one of the items of evidence which tended to prove such facts. The other evidence, and the other facts found by the court, showed that the description in each of the separate deeds of Reid, Heitkam and Jose to their respective tracks abutting on said street, were made with reference to such street; that in the Heitkam deed the streets were expressly mentioned and referred to in the description; that all the abutting subdivisions and plats afterwards filed were made with reference to such strip being a street, and the city of Indianapolis by its proper officers so recognized it, and made improvements with reference to it, and changed the original name thereof. The deed of September 28, 1870, from Wingate, referred to the piece of

ground then conveyed as a "piece of ground laid out and to be used as a street", showing that it had been laid out by Wingate before the execution of such quitclaim deed. The contention of appellants that this deed was improperly admitted in evidence because it does not describe the strip of ground in question, is without merit. The error in description is apparent on the face of the deed. The piece of ground is described as being in the west half of the northeast quarter of section eighteen (18) and yet the beginning point is designated as being 475 feet west of the northeast corner of such section.

It appears from the record that appellants offered as a part of their chain of title a deed of date June 30, 1904, from the heirs of Joseph F. Wingate 6. and Lucy Wingate, his wife, in which they release and quitclaim to appellant, Oscar A. Jose, the strip of ground in question and it is expressly stated in such deed that it is made "for the purpose of correcting a certain deed executed by Joseph F. Wingate and Lucy A. Wingate his wife, to Nicholas Jose, John B. E. Reid, and George H. Heitkam, dated September 28, 1870, and recorded in land record 'TT', page 219 of the Marion County recorder's office, by which said Wingate and wife, attempted to convey a tract of ground to said Jose, Reid and Heitkam, and erroneously described the same as commencing four hundred and seventy-five (475) feet west of the northeast corner of section eighteen (18), township fifteen (15) north, of range four (4) east, instead of starting the same four hundred and seventy-five (475) feet west of the northeast corner of the west half of the northeast quarter of said section eighteen (18)." In this connection it is insisted by appellants that there was no issue presented by the pleadings for the reformation of the deed by Wingate and wife

to Jose, Reid and Heitkam, and that the evidence offered for such purpose was improperly admitted. As before indicated, appellees were not seeking to reform or correct such deed nor were they seeking to reform or correct any instrument or conveyance in their chain of title to lots 13 and 32 abutting on said street. The theory of appellees' complaint is that the strip of ground in question is, or was before its vacation, a street and that as the owners of lots 13 and 32 abutting on either side of such street, they own to the center thereof. Hence any evidence which showed or tended to show that such strip of ground had been laid out or dedicated as a street was admissible under the issues. The evidence objected to tended, at least, to prove this fact, and hence was admissible for this purpose. So, too, appellees' claim being based on the ownership of lots 13 and 32 abutting on said strip of ground, all the conveyances showing appellees' chain of title to said lots back to said remote grantor who is claimed to have laid off and dedicated the strip of ground, were proper and admissible.

It is urged by appellants that because appellees own the lots on either side of said street it does not follow that they own to the center of such

7. street, but that the proof should have gone further and shown that such street or highway was dedicated or laid off by one who at the time of such dedication owned the abutting land on either side. We have no doubt that this contention of appellants is also correct. While some of the authorities contain some general statements to the effect that the abutting lot owners on a street own to the center of such street, such statements are too broad and general and were in each case no doubt intended to have general application to owners of lots along such street only as had been

laid out or dedicated by a person who at the time of such dedication, owned the abutting land on either side of such street or where the abutting property owners on each side of the street had donated or dedicated their half of the land over which the street passed. To this effect are the following cases: *Erwin v. Central Union Tel. Co.* (1897), 148 Ind. 365, 46 N. E. 667, 47 N. E. 663; *Haslett v. New Albany Belt, etc., R. Co.* (1893), 7 Ind. App. 603, 34 N. E. 845. Both the evidence and the findings herein as before indicated not only show that the strip of ground in question was a street at the time the appellees bought their lots abutting thereon, but they also show, in effect, that it was laid off and dedicated by appellees' remote grantor, J. F. Wingate, who, at the time of such dedication, owned the abutting land on either side thereof; that his grantees who purchased such abutting land subdivided and platted it into city lots with reference to such street, which was indicated on such plats, and, in some of the plats, referred to as having been given by said Wingate, and the lots so platted were bought and sold with reference to such plats and the streets shown thereon. The evidence and the findings bring the case clearly within the rule announced in the cases, *supra*, and completely meet the requirement of appellants' contention.

We next consider the questions which arose during the trial relating to the admission of evidence affecting the issues tendered by the appellants'

8. cross-complaint based on the occupying claimant's statute. When the appellant, Oscar Jose, was on the stand testifying, he stated that it was suggested to him that the strip of ground in dispute was never used and ought to go to his mother, and that he was asked to investigate and find out whether she would be entitled to it again.

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The witness was then asked to tell what he did and in answer thereto stated, among other things, that he consulted Judge Thompson at the Bobbs-Merrill Company and asked him to look the matter up for him; that later he went back to see Mr. Thompson and he said—. At this point an objection was interposed and appellants then offered "to prove by this witness that he consulted Judge Thompson, who was practicing law and had been for years at the Winchester bar and had moved to this city after many years of experience at the bar, and he advised him that he could obtain complete title of this property by bringing suit, and that pursuant to that advice he did take such action as he advised him to take." The objection was sustained and the offered evidence excluded. It is insisted that this was error and in support of this contention it is urged that "whenever a state or condition of mind becomes material in giving character to an act performed the advice of counsel learned in the law, under the influence of which the act was done, has ever been deemed and held to be controlling." Appellants cite in support of this position: *Cutter v. State* (1873), 36 N. J. L. 125; *People v. Whaley* (1827), 6 Cow. (N. Y.) 661; *Commonwealth v. Shedd* (1804), 1 Mass. 227; *Roy v. Goings* (1885), 112 Ill. 656; *Sharpe v. Johnson* (1882), 76 Mo. 660; *Smith v. Austin* (1882), 49 Mich. 286, 13 N. W. 593; 2 Greenleaf, Evidence §459; Cooley, Torts 183; *Cuthbert v. Galloway* (1888), 35 Fed. 466; *Mesher v. Iddings* (1887), 72 Iowa 553, 34 N. W. 328; *Cahill v. Benson* (1898), 19 Tex. Civ. App. 30, 46 S. W. 888; *Whitney v. Richardson* (1858), 31 Vt. 300. The authorities in effect hold as appellants contend, but the offered evidence is not brought within their application. The state or condition of mind here involved related to the time

appellant made the improvements for which he seeks to be reimbursed. It related to his good faith in making such improvements and even if it should be admitted that a part of the offered evidence was competent as throwing light on such question, yet the offer involved the conclusion of the witness that he had followed certain advice given by the attorney and perfected the title to the real estate involved in accordance therewith. When competent and incompetent

evidence is blended together and offered  
9. as a whole, it is not error to sustain an objection to the whole. *City of Terre Haute v. Hudnut* (1887), 112 Ind. 542, 549, 13 N. E. 686; *Cincinnati, etc., R. Co. v. Roesch* (1891), 126 Ind. 445, 447, 448, 26 N. E. 171. The witness was permitted to testify that he turned the matter over to Mr. Myers, an attorney, and that he brought suit to quiet title and after quieting title advised him that it was safe to put a house on the premises. Mr. Myers, the attorney, was also permitted to testify on the same subject. Appellant got the benefit of all the evidence which the authorities cited warrant, and the offered evidence was properly excluded.

We next consider whether the decision of the court on the issues presented by the cross-complaint of appellant, Oscar Jose, is sustained by sufficient evidence, and whether the court erred in its second conclusion of law. Practically the same question is presented by each of the two errors relied on. The difficult question presented by these alleged errors is to determine whether, under the evidence and the findings, the appellant acted in good faith in making the improvements for which he seeks to be

reimbursed. Appellants contend that the bur-

10 den was on appellee to show bad faith, but we can not agree with this contention.



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Appellants' cause of action for improvements and taxes is statutory and to obtain the benefits of such statute the decisions require that they shall bring themselves strictly within its terms. The statute expressly provides that recovery may be had for such improvements and taxes when made in good faith under color of title. §1121 Burns 1914, §1074 R. S. 1881; *Doren v. Lupton* (1900), 154 Ind. 396, 399, 56 N. E. 849; *Chesround v. Cunningham* (1832), 3 Blackf. 82; *Westerfield v. Williams* (1877), 59 Ind. 221, 224. It seems clear that under this statute the burden of proof on the question of good faith was on appellants. Language in some of the decisions may indicate the contrary, but this, we think, results from the presumption of good faith which appellants have in their favor. Bad faith like fraud is never presumed but the presumption is in favor of good faith. *Hilgenberg v. Northup* (1893), 134 Ind. 92, 93, 94, 33 N. E. 786; *Fish v. Blasser* (1896), 146 Ind. 186, 188, 45 N. E. 63.

The appellants start with such a presumption in their favor and unless the evidence be sufficient to outweigh such presumption or to weigh equally with it, such presumption will be sufficient to turn the scales in appellants' favor, but notwithstanding this presumption, the burden of proof on such question was at all times on appellants, and if the evidence of bad faith weigh equally with the evidence of good faith considered and weighed in connection with such presumption, then the decision would have sufficient evidence for its support. For a discussion of the effect of such presumptions see: *Keys v. McDowell* (1913), 54 Ind. App. 263, 100 N. E. 385, and authorities there cited; *Bates v. Pickett* (1854), 5 Ind. 22, 61 Am. Dec. 73; *Adams v. Slate* (1882), 87 Ind. 573, 575. Appellants having the burden of this issue it follows that the findings must

show good faith or must show facts from which the presumption or inference of good faith necessarily arises before they would be entitled to a conclusion of law in their favor on such issue. There is no express finding of good faith, but we think that under §1128 Burns 1908, §1081 R. S. 1881, and the authorities construing the same, the findings clearly show color of title in appellants when they erected their building, and such finding, under the authorities, seems to be sufficient to raise the presumption of good faith. *Hilgenberg v. Northup, supra; Fish v. Blasser, supra.* If nothing further on this subject were shown by the findings we would feel that the authorities cited would require us to hold that the conclusion of law on this issue should have been in appellants' favor but the court further found on this subject that "Defendants with full knowledge of the rights of the plaintiffs in and to said tract of ground and that said Hart Street had not been vacated in June, 1904, built a ten-room tenement house thereon," etc. It will be observed that the court found that it was with full knowledge of the rights, "not claims", of plaintiffs that the defendants built their house. Appellants might have built with knowledge of the *claims* of appellees, and yet built in good faith, but if they *actually knew the rights* of appellees, they could not have so built. *Knowledge of the rights* of appellees when they built is inconsistent with good faith. This finding we think overcomes any presumption arising from appellants' color of title and warranted the court's second conclusion of law, and there was some evidence to support such finding.

Since the filing of the original opinion in this case, a petition for a rehearing has called our attention to the fact that we overlooked a question presented by the appellants in their original briefs. It is insisted that the trial

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court failed to include in its special finding of facts a finding that appellees were entitled to the possession of the real estate in controversy. A careful examination of the finding discloses that appellants are correct in their contention. Such a finding seems to be made necessary both by the statute on which this action is based and by the decisions construing it. §§1096, 1100 Burns 1914, §§1050, 1054 R. S. 1881; *Pittsburgh, etc., R. Co. v. O'Brien, supra*.

The absence of said finding of fact is fatal to the first conclusion of law and the judgment based thereon and necessitates a reversal of the judgment. Other questions are discussed, but they are not of controlling influence and may not arise on a second trial, and hence need not be considered. Judgment reversed with instructions to the court below to grant a new trial and for further proceedings consistent with this opinion. Lairy, C. J., Ibach, Caldwell, Felt and Shea, JJ., concur.

### ON PETITION FOR REHEARING

HOTTEL, J.—Appellees in a petition for rehearing in this case earnestly urge that the facts found by the trial court, taken as a whole, 12. necessitate the inference that the appellees were entitled to the possession of the real estate in controversy. In support of this contention it is urged that appellees' right to the possession of the abandoned street in controversy necessarily rests on their right to the possession of their abutting lots on either side of such street, and hence, that a finding that appellees were entitled to the possession of such lots would of necessity carry with it a finding that they were entitled to the possession of that part of the street in controversy.

The legal proposition involved in this contention, that the right to possession of the lots under the facts

of this case would of necessity carry with it the right to the possession of that part of the street on which they abut, is doubtless correct; but, the trouble with appellees' contention is that there is no finding that they were in possession of or entitled to the possession of the abutting lots. As to such lots there is a finding to the effect that the title to them had been conveyed to appellees and that such title *rested* in them at the time of the trial. This finding would probably necessitate the inference of ownership of such lots, but not *necessarily* an inference of possession or the right to such possession. So far as the finding shows, the lots may have been rented or leased for a period of years and the right to possession thereof may have been in the lessee rather than the owner.

We are aware that some of the more recent cases of the Supreme Court have to some extent relaxed the rule of the inference to be indulged in favor of pleadings, but we do not feel that these cases authorize the inference for which appellees contend in favor of the finding in this case. On the contrary the present holdings of the Supreme Court on the subject of the inferences to be drawn in favor of a special finding of facts support the opinion heretofore rendered in this case and hence the petition for rehearing is overruled.

NOTE.—Reported in 103 N. E. 392, 852. As to chattels or fixtures as subjects of ejectment, see 116 Am. St. 574. As to the general rule that plaintiff in ejectment must recover, if at all, on the strength of his own title, see 18 L. R. A. 781; 45 L. Ed. U. S. 423. See, also, under (1) 3 Cyc 26; (2) 15 Cyc 123; (3) 15 Cyc 20; (4) 13 Cyc 486; 28 Cyc 845; (5, 6) 15 Cyc 135; (7) 28 Cyc 846; (9) 38 Cyc 1335; (10) 15 Cyc 231, 235; (11) 15 Cyc 229; (12) 15 Cyc 166, 169.

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## VAN SANT, ADMINISTRATOR v. WENTWORTH.

[No. 8,541. Filed May 25, 1915. Rehearing denied December 17, 1915. Transfer denied January 27, 1916.]

1. *APPEAL.—Review.—Intervening Errors.*—Intervening errors, if any, need not be considered where a correct result has been attained in the trial court. p. 592.
2. *TRIAL.—Directing Verdict.—Announcement of Intention.—Right to Dismiss Action.*—Under §338 Burns 1914, §333 R. S. 1881, providing that an action may be dismissed without prejudice before the jury retires, or, if tried by the court, at any time before the finding of the court is announced, the plaintiff is entitled to a dismissal without prejudice on his motion made after the court has announced its intention to give a peremptory instruction for defendant and before the instruction is actually given. p. 592.
3. *TRIAL.—Directing Verdict.—Province of Jury.*—Where the court directs a verdict it is not within the province of the jury to deliberate and determine what verdict shall be returned. p. 592.

From Vigo Circuit Court; *George A. Scott*, Special Judge.

Action by Mollie Wentworth against Richard H. Van Sant, administrator of the estate of Samuel H. Van Sant, deceased. From a judgment of dismissal, the defendant appeals. *Affirmed.*

*William P. Evans* and *Bert Beasley*, for appellant.  
*Charles L. Fleshman* and *S. P. Douglas*, for appellee.

CALDWELL, P. J.—This was an action brought by the appellee to establish a claim against the estate of appellant's decedent. At the close of the evidence the appellant moved the court for a peremptory instruction in his behalf. In the absence of the jury the court heard argument respecting the giving of the instruction, and at the close of the argument indicated its determination in the following language: "The court announces its decision, which is that it will give instruction No. 1 to the jury, directing the jury to return a verdict for the defendant herein."

The jury was recalled, but before such instruction was in fact read or given to the jury, appellee moved the court to dismiss the cause without prejudice, which motion the court overruled. The court thereupon instructed the jury to return a verdict in favor of appellant, in obedience to which, the jury returned the following verdict: "We, the jury, find for the defendant, Richard H. Van Sant, administrator of the estate of Samuel H. Van Sant, deceased." Appellant thereupon moved the court for judgment on the verdict. Afterwards at the same term of court, appellee filed the following motion: "Plaintiff moves the court to set aside the verdict of the jury in the above entitled cause, and to sustain the motion of the plaintiff hereinbefore made to dismiss her cause of action herein." The court thereupon sustained such motion, and set aside the verdict, and entered judgment dismissing the cause without prejudice, pursuant to appellee's motion theretofore filed to that end.

The question is properly presented as to whether the court erred in sustaining the motion to set aside the verdict, and also in sustaining the motion to dismiss the cause. If the motion to dismiss should have been sustained in the first instance, then a correct result was reached

eventually, and the question of the inter-

1. mediate proceedings becomes unimportant. §§407, 700 Burns 1914, §§398, 658 R. S. 1881.

We, therefore, proceed to determine whether

2. appellee should have been permitted to dismiss the cause when she first moved to that effect. The statute that controls is as follows:

3. lows: "An action may be dismissed without prejudice \* \* \* by the plaintiff, before the jury retires; or when the trial is by the court, at any time before the finding of the

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court is announced." §338 Burns 1914, 333 R. S. 1881. Where the court directs a verdict, it is not within the province of the jury to deliberate and determine what verdict shall be returned. In such case, its power is circumscribed by the court's direction. *McClaren v. Indianapolis, etc., R. Co.* (1882), 83 Ind. 319. Wherefore, appellant argues that the court having made the announcement as indicated, respecting the giving of a peremptory instruction, the trial in effect thereupon became a trial by the court rendering applicable the last clause of the statute above set out. Appellant's contention is supported by *Adams v. St. Louis, etc., R. Co.* (1911), 137 S. W. (Tex. Civ. App.) 437, the court there saying: "where a motion is made for an instructed verdict, as in this case, and the court decides that such motion should be sustained, the question of when the plaintiff can take a nonsuit must be determined by the provisions of the statute governing a case being tried before the court without a jury." We shall, therefore, first consider this case from that standpoint. Appellant argues that the court's language was sufficient to inform appellee respecting the fate that awaited her cause, and that to permit a dismissal without prejudice under such circumstances with the consequent right to refile, would be grossly inequitable; that thereby an unwarranted advantage would be extended to appellee, in that an opportunity would be afforded to retry the cause, after it had in fact been lost. Hence, the contention is that the court's language should be construed as an announcement of the finding within the meaning of the statute. Notwithstanding the apparent plausibility of the argument, the question of whether the court did announce a finding must be determined from a consideration of the



statute, the scope of which we proceed to ascertain in the light of the decided cases.

In *Crafton v. Mitchell* (1893), 134 Ind. 320, 33 N. E. 1032, two causes were identical, except as to parties and lands involved, and were tried together. The court having read the special finding and conclusions of law in one of the cases, announced that the finding and conclusions in the other case had not been prepared, but that they would be identical with those read, except as to parties and lands described. Held, that the court did not thereby announce the finding in such other cause, within the meaning of the statute, and that there was no error in sustaining plaintiff's motion to dismiss such cause thereupon interposed. In *Mitchell v. Friedly* (1891), 126 Ind. 545, 26 N. E. 391, there was a like holding, where the court having announced a general finding, recalled it on the suggestion that a special finding had been requested, the court saying in substance, that the general finding so announced was not binding on the court, and "was no more authoritative under the circumstances, than if he had called the attorneys to the bench and made known what his finding would be"; that it could not be said as matter of law that appellant was informed when he made the motion to dismiss that the court's finding would be adverse to him. See, also, *Cohn v. Rumely* (1881), 74 Ind. 120; *Burns v. Reigelsberger* (1880), 70 Ind. 522; *Beard v. Becker* (1880), 69 Ind. 498; *Louisville, etc., R. Co. v. Wylie* (1890), 1 Ind. App. 136, 27 N. E. 122; *Halstead v. Sigler* (1905), 35 Ind. App. 419, 74 N. E. 357; *Moore-Mansfield, etc., Co. v. Marion, etc., Traction Co.* (1913), 52 Ind. App. 548, 555, 101 N. E. 15.

Assuming, for purposes of the discussion, the soundness of appellant's position that the question here must be determined from a consideration of

the statutory provision relating to dismissals where the trial is by the court, and under the foregoing authorities this cause should be affirmed. Although the court has hinted or intimated or made a preliminary statement respecting what the finding will be, but has not in fact announced the finding, a plaintiff may avail himself of the statute and dismiss without prejudice. *Adams v. St. Louis, etc., R. Co., supra*, seems to be in point. In that case, defendant moved the court to direct the verdict. After argument, the court announced that the motion would be sustained, and so informed the plaintiff's attorney, who thereupon moved for a nonsuit, but was overruled on the ground that the motion came too late. The statute applicable provided that a nonsuit might be taken at any time before the jury retired or when the trial was by the court "any time before the decision is announced." The Supreme Court on appeal applied the latter provision of the statute, and in the original opinion sustained the trial court. On petition for a rehearing, however, the decision was otherwise, the court saying: "After more mature reflection, we have concluded that the mere announcement by the trial judge of what his decision will be, although provoked by inquiry of counsel, is not such an announcement of his decision as is contemplated by the statute, which declares that when the case is tried by the judge a nonsuit may be taken at any time before the decision is announced." However, as a general rule, the courts in cases where a motion is made to direct a verdict and the court announces a purpose to give a peremptory instruction to that effect, apply the provision of the statute relating to dismissal without prejudice where the trial is by jury. In such case it would seem that where such an announcement is made, and the plaintiff thereupon

moves to dismiss, he is within the statute as the motion is made before the jury has retired, and so it seems, the courts hold. The provision respecting the jury retiring evidently has reference to the time or situation wherein the jury has retired for the purpose of returning a verdict after the cause has been finally submitted to it. Thus, in *Gassman v. Jarvis* (1899), 94 Fed. 603, decided under §338, *supra*, and under circumstances practically identical with those presented here, the court said: "A careful examination of the authorities has convinced me that the announcement by the court of its intention to give a binding instruction to the jury to find for the defendant was not such a submission of the case as to bar the plaintiff's right to dismiss before the jury had retired." In *Mullen v. Peck* (1881), 57 Iowa 430, 10 N. W. 829, the circumstances also were similar to those here. The statute applicable provided that the plaintiff might dismiss without prejudice, "before the final submission of the case to the jury." The trial court denied plaintiff's motion to dismiss made after the court had indicated its purpose to give a peremptory instruction for defendant. The supreme court of Iowa, in reversing the trial court, used this language: "In the present case the plaintiff offered to dismiss before the jury had been instructed. No matter if the court had indicated what the instructions would be, for it is possible the court might change its mind and the plaintiff had the right to take his chances in that respect. What the instructions would be could only be known after they were read to the jury." In *Vertrees' Admr. v. Newport News, etc., Co.* (1894), 95 Ky. 314, 25 S. W. 1, the following language is used: "although the court had sustained plaintiff's motion for the peremptory instruction, there had not been any submission of the case,

final or otherwise, to the jury before plaintiff moved to dismiss the case, for it is stated that the jury was not actually instructed to find for defendant until after the motion of plaintiff to dismiss was made." In that case, the lower court was reversed for denying plaintiff's motion to dismiss, the statute providing that plaintiff might dismiss his cause without prejudice before final submission of the case to the jury, or to the court, if the trial be by the court. See, also, *Beals v. Western Union Tel. Co.* (1898), 53 Neb. 601, 74 N. W. 54; *New Hampshire Banking Co. v. Ball* (1897), 57 Kan. 812, 48 Pac. 137; *Somerville v. Johnson* (1891), 3 Wash. 140, 28 Pac. 373; note to *Van Wagenen v. Chladek* (1911), Ann. Cas. 1913 D 523; note to *Bee Bldg. Co. v. Dalton* (1903), 4 Ann. Cas. 508, 510; 14 Cyc 401, *et seq.* Judgment affirmed.

NOTE.—Reported in 108 N. E. 975. As to what constitutes final submission of cause so as to preclude voluntary dismissal, see 4 Ann. Cas. 510. See, also, under (1) 3 Cyc 223; (2) 38 Cyc 1588, 1589; (3) 38 Cyc 1589.

### POWELL v. JACKSON.

[No. 8,950. Filed January 27, 1916.]

1. EXECUTORS AND ADMINISTRATORS.—*Authority.—Appointment of Special Administrator.—Power of Court.*—The authority of an administrator properly appointed extends to and embraces all the property of which the decedent died possessed until his discharge or the revocation of his letters; and where there is a regular administrator duly appointed, qualified and acting, the court is without power to appoint a special administrator, since the jurisdiction of a court to grant letters of administration is statutory and there is no statutory provision for a special administrator where the estate is in the hands of a regular administrator. p. 600.
2. EXECUTORS AND ADMINISTRATORS.—*Exceptions to Report.—Authority of Court.*—Where exceptions were filed to an administrator's final report on the ground that he had not accounted for a note owing to the estate by him personally, and issues were joined on the exceptions, the court had full power without the assistance

of a special administrator to determine whether the alleged note was in fact an asset of the estate, and, if so, to set aside the report and order a new one, and §2762 Burns 1914, §2245 R. S. 1881, relating to the removal of the administrator, provided an ample remedy in the event of the administrator's refusal to obey such order. p. 605.

3. EXECUTORS AND ADMINISTRATORS.—*Status as Representative and Individual.*—*Collection of Debt Due From Administrator as Individual.*—*Authority of Court.*—An administrator as such has a status separate and distinct from himself as an individual, and hence, where suit becomes necessary for the enforcement of a claim alleged to be due the estate from him in his individual capacity, the court may order him as administrator to sue himself as an individual, and under §2839 Burns 1914, §2321 R. S. 1881, may appoint an attorney to represent the estate the same as in a proceeding for the collection of a claim from the estate in favor of the administrator. p. 605.
4. EXECUTORS AND ADMINISTRATORS.—*Right to Sue.*—*Denial of Right.*—*Statutory Provisions.*—*Action by Special Administrator.*—Notwithstanding the provisions of §2810 Burns 1914, §2292 R. S. 1881, whereby the right of an administrator to sue can not be questioned except by pleading under oath, the court erred in sustaining the demurrer to certain answers in bar in an action by a special administrator against the regular administrator, where the question raised by such demurrer went to the authority of the court to appoint the special administrator rather than to the latter's authority to sue, and the answers stated facts to show that his appointment was unauthorized. p. 606.
5. APPEAL.—*Review.*—*Questions Presented.*—No question is presented on the overruling of a motion for new trial for alleged error in instructions where appellant's brief contains no proposition addressed to the giving or refusal of instructions. p. 606.
6. APPEAL.—*Questions Reviewable.*—*Weight of Evidence.*—Questions which go to the weight of the evidence are not reviewable on appeal where the evidence is both oral and documentary. p. 606.

From Rush Circuit Court; *Wallace Morgan*, Special Judge.

Action by Cary Jackson, as special administrator of the estate of Amelia J. Powell, deceased, against Robert F. Powell. From a judgment for plaintiff, the defendant appeals. *Reversed.*

*John H. Kiplinger*, for appellant.

*A. L. Gary*, for appellee.

MORAN, J.—On December 13, 1911, appellant

filed his final report as the administrator of the estate of Amelia J. Powell, deceased, and on the following day exceptions were filed to the same, on the ground that the administrator had failed to charge himself with the proceeds of a certain promissory note calling for \$175, executed by appellant to Amelia J. Powell. On December 19, 1911, the exceptions were submitted to the court and evidence heard, and after hearing the argument of counsel, the court took the cause under advisement; and while the cause was under advisement and before the court had passed upon the same, the court on its own motion appointed appellee as special administrator of the estate of Amelia J. Powell for the purpose of inquiring into the facts surrounding the execution of the note. On April 25, 1912, the court ordered the special administrator to bring an action against appellant on the note. Upon issue being joined and a trial had, a verdict was returned against appellant and in favor of the estate of Amelia J. Powell in the sum of \$125. An appeal has been prosecuted from a judgment on the verdict by appellant.

The main question involved in this appeal is the authority of appellee to have prosecuted the action against appellant. This question is presented on exceptions reserved to the sustaining of a demurrer to three separate paragraphs of a plea in abatement and by exceptions reserved to the sustaining of a demurrer to four separate paragraphs of answer on the merits of the cause. It is disclosed by the various pleadings addressed to the complaint that, while the court had under advisement the questions raised by the exceptions filed to appellant's final report as the administrator of the estate of Amelia J. Powell, it appointed a special administrator to bring an action against appellant on a certain promissory note

executed by appellant to Amelia J. Powell, during her lifetime, and which was not accounted for in the final report, as aforesaid. The exceptions to the final report were never passed on by the court and appellant was the duly acting and qualified administrator of the estate at the time appellee was appointed as such special administrator and continued as such throughout the litigation. Appellee as such special administrator was not sworn to perform or discharge any duty nor did he execute a bond of any kind or character to perform his duties faithfully. He had no authority other than being named by the court as such special administrator, and to his appointment appellant duly excepted at the time he was so named by the court.

Appellant very vigorously insists that the court had no authority to appoint a special administrator of the estate under the circumstances, for the reason that he was at the time the duly ap-

1. pointed, qualified and acting administrator of the estate. To this contention, appellee's answer is that the circuit court has exclusive jurisdiction of all probate matters and is vested with large discretionary power and when the procedure is not directed by statute, as in the matter here involved, the procedure will be supplied by invoking the equity jurisdiction of the court. In support of this position, the following authorities are cited. *Hildebrand v. Kinney* (1909), 172 Ind. 447, 87 N. E. 832, 19 Ann. Cas. 788; *Pease v. Christman* (1902), 158 Ind. 642, 64 N. E. 90; *Langsdale v. Woollen* (1889), 120 Ind. 78, 21 N. E. 541; *Dehart v. Dehart* (1860), 15 Ind. 167. *Hildebrand v. Kinney*, *supra*, was a case where a claim for funeral expenses was saved from the statute of limitations on the ground that it was not a debt against the decedent, but a charge imposed by law on equit-



able principles, and that the appointment of an administrator related back to the death of the decedent for the purpose of preserving any rights in favor of the estate, one of such rights being that of a Christian burial. In *Pease v. Christman, supra*, where reimbursement was sought by the widow for money expended for a monument erected at the grave of her deceased husband, it was held that in the exercise of probate jurisdiction, the court had the right to determine equitable questions when properly presented and award all necessary relief whether legal or equitable. *Langsdale v. Woollen, supra*, holds that the presumption was in favor of jurisdiction of the common pleas court, it being a court which exercised jurisdiction of all matters of probate at the time the administrator was appointed. In *Dehart v. Dehart, supra*, where a widow filed a petition in the probate court showing a release by her of a dower estate to her son, who had agreed to convey to her a life estate in other lands, and praying for specific performance, it was held that the proceeding was one in chancery, and that, as a court of equity, the probate court had jurisdiction concurrent with the circuit court. It can readily be seen that the authorities relied on by appellee are not highly instructive as to the question presented by appellant. It is provided by statute (§2753 Burns 1914, §2237 R. S. 1881), that a special administrator may be appointed for the purpose of preserving the property of the testate, until an executor or administrator could be duly appointed and likewise, if an executor or administrator should die, resign, remove from the State or his authority be revoked or superseded, an administrator *de bonis non* may be appointed; and also, if after final settlement it is found that assets of the estate have not been administered upon, an

administrator *de bonis non* may be appointed. §§2756, 2757 Burns 1914, §2240 R. S. 1881, Acts 1891 p. 107. And if a person shall have died testate and notice of contest of the will shall have been given, it is lawful for the court to appoint a special administrator to take charge of the estate, so far as the same is consistent with the will. §2755 Burns 1914, §2239 R. S. 1881. There is no statute in this State authorizing the appointment of a special administrator while there is a regular administrator, duly appointed, qualified and acting. So, if the court had authority to appoint appellee as a special administrator under the circumstances in the case at bar, it must have been independent of any statute. "The appointment of an executor vests the whole personal estate in the person so appointed. He holds as trustee, for the purposes of the will, but he holds the legal title in all the chattels of the testator. He is, for the purpose of administering them, as much the legal proprietor of those chattels, as was the testator himself while alive. This is incompatible with any power in the ordinary to transfer those chattels to any other person by the grant of administration on them. His grant can prove nothing; it conveys no right, and is a void act." The above language is quoted with approval in the case of *Kane v. Paul* (1840), 39 U. S. \*33, 10 L. Ed. 341, as taken from an early and lucid opinion of Chief Justice Marshall (*Griffith v. Frazier* [1814], 8 Cranch 9, 3 L. Ed. 471), and which latter opinion in its final analysis holds that where there is one qualified executor, the court is without jurisdiction to appoint another. By numerous authorities it has been held that after letters of administration have been granted, the court has no power to appoint an administrator *pendente lite* unless such letters have

first been revoked. 11 Am. and Eng. Ency. Law (2d ed.) 803, 826; *Hooper v. Scarborough* (1877), 57 Ala. 514; *Davis v. Shuler* (1874), 14 Fla. 438; *Newman v. Schwerin* (1894), 61 Fed. 865, 10 C. C. A. 129; *Grave v. Neel* (1883), 41 Ark. 165; *Schroeder v. San Mateo Co.* (1886), 70 Cal. 343. In *Landers v. Stone* (1873), 45 Ind. 404, it was said, "when there is a will, there shall be either an executor or an administrator with the will annexed, \* \* \* and when there is no will, there is simply an administrator, whose authority extends to and embraces all the property of which the decedent died possessed. Under such a construction, there will be no confusion. The entire estate is in the hands of one person." In *Jones v. Bittinger* (1887), 110 Ind. 476, 11 N. E. 456, it was said, "Until the letters so granted have been revoked or set aside, in a proper proceeding for that purpose, the refusal of the proper court to grant other letters of administration upon the same estate to another person, although such person may have a right under the statute prior to that of the person to whom the letters were first issued, is not and cannot be erroneous." In *Munnikhuisen v. Magraw* (1871), 35 Md. 280, the court held that when a will has been admitted to probate and letters testamentary actually granted, the executors have qualified and their letters remain unrevoked, the court has no power to appoint an administrator *pendente lite*, since there would be two parties each clothed with powers of administration at the same time.

In some jurisdictions the court having authority to grant letters of administration in the first instance may thereafter appoint a special administrator or an administrator *pendente lite*, but in those jurisdictions it appears that such appointment is

authorized directly or indirectly by statute. Under the statute of Tennessee such appointment is authorized by the chancery court where the estate of the deceased person must be represented and the executor or administrator is interested adversely thereto. In *Newman v. Schwerin*, *supra*, the court said: "Under the Tennessee statute the power to make such limited appointment was conferred only upon the express condition that there was no administrator, or that the administrator was incapacitated from acting by reason of an adverse interest." It is the law of this State that the jurisdiction of a court to grant letters of administration is derived from the statute and can be exercised only in cases so provided. *Jeffersonville R. Co. v. Swayne's Admr.* (1866), 26 Ind. 477; *Razor v. Mehl* (1900), 25 Ind. App. 645, 57 N. E. 274, 58 N. E. 734; *Croxton v. Renner* (1885), 103 Ind. 223, 2 N. E. 601; *Toledo, etc., R. Co. v. Reeves* (1894), 8 Ind. App. 667, 35 N. E. 199; *Curry v. Plessinger* (1912), 50 Ind. App. 166, 96 N. E. 190, 97 N. E. 124. For the court to appoint a special administrator in the manner and under the circumstances of the case, we think, would be carrying the inherent or discretionary powers of the court beyond that contemplated by our practice. Appellee, without letters being issued to him, bond executed or oath administered, displaced the regular officer of the court in the administration of the estate as to the collection of the claim in controversy. To sanction this, we believe, would be such an enlargement of the court's inherent or discretionary powers as to invite a practice, which might in the future lead to harmful results, especially in view of the fact that other remedies provided by statute were open to the court. The regular administrator was an officer and servant of the court. The estate was being administered by the court through its

servant and officer. There was ample power

2. lodged in the court without the assistance of a special administrator to reach the matter in controversy. The parties appeared and issues were joined on the exceptions to appellant's final report and the court had full power to determine in this proceeding whether the claim alleged to be due from appellant to the estate was in fact an asset of the estate and if so, the report should have been set aside and a new report ordered to conform to the judgment of the court. And if the administrator fails to obey the order of the court the statute (§2762 Burns 1914, Acts 1883 p. 151) is very comprehensive in its scope as to the grounds of removal of an administrator, and afforded the court a remedy in this respect. No doubt at the time the court appointed

the special administrator, and ordered him to

3. bring the action against appellant, it could have ordered the regular administrator to have done so, as Powell, administrator of the estate, and Powell in his own right were two separate and distinct persons (*Moore v. Ferguson* [1904], 163 Ind. 395, 72 N. E. 126), and under §2839 Burns 1914, Acts 1883 p. 155, the court could have appointed a practicing attorney of the bar to represent the estate the same as if the claim were in favor of the administrator. By §2981 Burns 1914, §2458 R. S. 1881, it is provided among other things that an administrator may be sued upon his bond for failing to inventory property of the decedent, failing to pay money into court according to law, the lack of diligence in collecting the claims due the estate, and for noncompliance with any order of the court respecting the estate.

Under §2810 Burns 1914, §2292 R. S. 1881, the right of an executor or administrator to sue can not be questioned unless the opposite party file a plea

denying such right, with his affidavit there-  
4. to attached as to the truth thereof. *McDowell v. North* (1900), 24 Ind. App. 435, 55 N. E. 789; *Kelley v. Love* (1871), 35 Ind. 106; *Nolte v. Libbert* (1870), 34 Ind. 163. The foregoing section of the statute prescribes the method of questioning the authority of an executor or administrator to sue. The question in the case at bar goes to the authority of the court to appoint an administrator under the circumstances, and as to whether the various paragraphs of the plea in abatement or either of them is sufficient to bring the same within the purview of §2810, *supra*, we need not decide, as paragraphs six and seven of the answer in bar plead all the facts and were sufficient to withstand a demurrer in view of the question involved. It, therefore, follows that the court erred in sustaining the demurrer to each of these paragraphs.

No error is presented on the overruling of the motion for a new trial, as under the subdivision of

“Points and Authorities” in appellant’s brief,

5. no proposition is addressed to the giving or refusing to give instructions (*Dunton v. Howell* [1915], *ante* 183, 109 N. E. 418);

6. and as to the other questions sought to be raised, they go to the weight of the evidence, which is oral and documentary, and under the well established rule of appellate procedure no question is presented in this behalf. *Cleveland, etc., R. Co. v. Christie* (1912), 178 Ind. 691, 100 N. E. 299; *Wellington v. Reynolds* (1912), 177 Ind. 49, 97 N. E. 155; *Espenlaub v. Hedderick* (1913), 52 Ind. App. 139, 100 N. E. 382.

For error of the court in sustaining the demurrer to the sixth and seventh paragraphs of answer aforesaid, judgment is reversed, with instructions

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to the court to overrule the same and for further proceedings in accordance with this opinion.

NOTE.—Reported in 111 N. E. 208. As to debts to estate owed by administrators, and how regarded as assets, see 132 Am. St. 230. As to the power of a court to remove an executor or administrator, see Ann. Cas. 1915 D 284. See, also, under (1) 18 Cyc 112, 113; (2) 18 Cyc 1196; (5) 3 C. J. 1429; 2 Cyc 1017; (6) 3 Cyc 378.

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WALLING v. TERRE HAUTE, INDIANAPOLIS AND  
EASTERN TRACTION COMPANY.

[No. 8,825. Filed January 28, 1916.]

1. MASTER AND SERVANT.—*Masterial Duty.—Safe Place to Work.*—The master must use ordinary care in providing his employes with a reasonably safe place in which to work. p. 610.
2. MASTER AND SERVANT.—*Injuries to Servant.—Assumption of Risk.—Knowledge of Servant.*—Under a complaint disclosing that plaintiff, who was employed as a lineman to repair defective and damaged wires along defendant's electric railroad, had been in defendant's employ some time before the accident in that line of work, and that he understood the particular work, and had full knowledge of the situation and condition of the car from the top of which he did his work, the plaintiff must be deemed to have assumed the risk from the uneven roof of the car. p. 610.
3. MASTER AND SERVANT.—*Assumption of Risk.—Inspection.—Lineman.*—While the rule of safe place applies in favor of one employed as a lineman, the general rule that the employe assumes the incidental and obvious risks of the service also applies, so that where the employer has no independent system of inspection, and the lineman is not so inexperienced as to be entitled to instruction, and has no reason to believe that an inspection has been made, the latter must make such tests himself as may be necessary to ascertain whether it is safe to proceed with his work, and can not hold the employer liable unless his injuries result from a defect existing in the poles, cross-arms, etc., when they were originally placed in position, or unless the employer had some knowledge of the defect which was not communicated to him. p. 611.
4. MASTER AND SERVANT.—*Assumption of Risk.—Inspection.—Lineman.*—Where the employer has provided an independent system of inspection, one employed as a lineman does not assume the risks that are not obvious to the ordinary use of the senses, and that could have been discovered by reasonable inspection, nor does he, in the absence of duty to inspect devolving on him, assume risks of which he has no actual or constructive knowledge. p. 612.



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5. MASTER AND SERVANT.—*Assumption of Risk.—Inspection.—Contract.*—Where one employed as a lineman is required by his contract to make an inspection of the poles, etc., he can not recover for injuries resulting from his failure to properly inspect. p. 613.
6. MASTER AND SERVANT.—*Injuries to Servant.—Lineman.—Complaint.—Defects in Ways and Works.*—In an action for injuries to one employed as a lineman to repair defective and damaged wires, etc., along defendant's electric railway, a complaint alleging that, plaintiff's injuries resulted from the breaking of a hanger which caused him to fall from the car on which he was standing, and alleging that the hanger was bent and defective, that it broke by reason of long use, defective condition and failure to inspect, that defendant knew of the defective and worn hangers along its line, but that plaintiff was ignorant of such defects and was not warned, and that he had nothing to do with the construction, placement and maintenance of hangers, and had no cause or reason to apprehend the breaking of the particular hanger, etc., and disclosing nothing to show a duty on plaintiff's part to inspect, was sufficient on demurrer. p. 613.

From Superior Court of Marion County (83,437);  
*Clarence E. Weir*, Judge.

Action by Clifford O. Walling against the Terre Haute, Indianapolis and Eastern Traction Company. From a judgment for defendant, the plaintiff appeals. *Reversed.*

*George W. Galvin*, for appellant.

*W. H. Latta*, for appellee.

IBACH, C. J.—Appellant was injured while in appellee's service as a lineman. The material averments of the amended complaint are the following: "In the performance of his duties in and along the line of his work under the terms of his employment, the said plaintiff was required to and did day after day go along and upon defendant's line and repair broken and defective wires and straighten bent and damaged wires at points along said line, suspended from hangers attached to poles, erected and placed by defendant. Defendant, at no time, as in the exercise of reasonable care it should have done, provided a work car for its employes, but required them to

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work from the tops of its passenger and freight cars. The work required to be done was extra hazardous, by reason of the defendant's negligence and carelessness in failing to furnish the proper car to work from. On the day of his injury, May 1, 1909, plaintiff was sent out to repair a broken, bent, or displaced wire of said company, and was directed to do said work from the top of one of its freight cars, the defendant at the time well knowing that the work so performed from the top of its freight car was more hazardous and dangerous than it would have been had the work been performed from a work car, and defendant also knew that such work was extra hazardous by reason of worn and defective hangers, negligently and carelessly placed and maintained in use by defendant, the existence of which was not known to plaintiff, the said plaintiff not knowing of the hazards incident to the work in hand from the top of said car. Defendant knew of plaintiff's lack of knowledge as to the additional hazard of this work and so knowing, negligently and carelessly sent him out upon said work without warning as to the peculiar hazard of the work by reason of such worn and defective hangers. On said date he went upon the car and undertook to straighten a hanger necessary to receive the wire upon which he was working from the top of the car, that had become bent and defective and which had been negligently and carelessly kept in use and maintained by defendant, and while so working, the hanger broke by reason of its long use, defective condition and failure to inspect, and he was thrown to the ground and injured, because of the breaking of the hanger, while with his uncertain footing upon the car and its unguarded and unrailed condition, and the peculiar hazards of the special work required of him, the defendant well

knowing that the hanger upon which he was required to work was likely to break and throw plaintiff from the car, which fact was unknown to plaintiff and he had no cause or reason to apprehend the breaking of the hanger, and had no reason to know and was not informed by defendant who did know, of the extra hazard of the work then to be performed and by warning and information had not been protected against such hazard. That plaintiff had nothing to do with the placement, maintenance and construction of the hanger, and no knowledge of its defects." A demurrer addressed to this pleading was sustained.

The only question presented for our consideration is whether a cause of action is stated. If it is to be held sufficient, it must be because the facts alleged show that appellee owed some special legal duty to appellant which it failed to perform and the injury resulted to him by reason of such failure. While the complaint contains many conclusions of the pleader, it is apparent that it proceeds upon the theory that the breached duties were the failure to provide appellant with a proper work car and in failing to inform him of the dangerous condition of the hangers, which formed a part of appellee's general system of wires, which dangers were unknown to him and were known to appellee. It is an elementary principle of law governing the relation of master and servant, that the master must use

ordinary care in providing his employes with

1. a reasonably safe place in which to work. But when all the facts well pleaded in this case are considered, we do not believe the
2. case is one which warrants the application of the "safe place" rule in all its strictness. The

complaint shows that appellant was employed as a lineman, his express duty was to repair defective

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wires and straighten bent and damaged wires wherever they might be found along appellee's line of road. It appears that appellant had been in appellee's employment for some time before the accident complained of, in the same line of work, performed in the same manner. It is fair to assume that he was a man of mature years, of fair intelligence and experience. So that if it were conceded that the complaint charges negligence in providing the car with an uneven and irregular roof in the first instance, it appears that all the work which appellant had done for appellee had been done from the top of a freight or passenger car, and the specific allegations of negligence are overcome by those which follow, clearly disclosing the fact that he undertook the particular work with full knowledge of the situation and condition of the car. Such condition then became an incident to his employment as a lineman and was a risk assumed by him.

There remains to be considered the averments of the complaint in respect to the defective hanger. It appears that the injury in this case was not caused by the presence of an electrical current in the

3. wires, but by the unsoundness of a hanger, or support from which wires were suspended. So the cases which deal with the soundness of poles and cross-arms, and their breaking, are the most nearly allied to this case of any which we have been able to find. "The rule of safe place applies to a line of poles and wires such as plaintiff was required to work upon, and it was the duty of the defendant to see that such poles, cross-arms, and wires were reasonably safe and free from latent defects and dangers, which ordinary care on its part might avoid." *City of Greenville v. Branch* (1913), 152 S. W. (Tex. Civ. App.) 478, citing 2 Cooley, Torts (3d ed.) 1123. The most important question is as to the assump-

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tion of the risk from the defective hanger, and whether the complaint states such facts as to show that appellant assumed the risk. It is a general rule applicable in master and servant cases that the employe assumes obvious risks, and those incidental to the service. *Ambre v. Postal Tel., etc., Co.* (1909), 43 Ind. App. 47, 86 N. E. 871; *Lyons v. City of New Albany* (1913), 54 Ind. App. 416, 103 N. E. 20; *Evansville Gas, etc., Co. v. Raley* (1906), 38 Ind. App. 342, 76 N. E. 548, 78 N. E. 254. The general rule applicable to cases such as this has been thus stated, "When the employer has no independent system of inspection of poles, cross-arms, steps, etc., and the lineman has no reason to believe that such inspection is made, he had no right to rely on the employer for such inspection, but must make such tests himself as may be necessary to ascertain whether it is safe to go upon them, and can not hold the employer responsible for injuries received by him by such poles, cross-arms, or steps giving away, unless there was some defect in them when they were originally placed in position, or the employer had some knowledge of the defect, which was not communicated to the lineman—provided, of course, the lineman is not such an inexperienced person as is entitled to be instructed as to the danger." *Consolidated Gas, etc., Co. v. Chambers* (1910), 112 Md. 324, 75 Atl. 241, 26 L. R. A. (N. S.) 509. See, also, *Flood v. Western Union Tel. Co.* (1892), 131 N. Y. 603, 30 N. E. 196; *Johnston v. Syracuse Lighting Co.* (1908), 193 N. Y. 592, 86 N. E. 539, 127 Am. St. 988; *Adams v. Central Ind. R. Co.* (1906), 38 Ind. App. 607, 78 N. E. 687; *Evansville Gas, etc., Co. v. Raley, supra*. If the employer has provided an independent system of inspection, the employe

4. does not assume risks which are not obvious to the ordinary use of the senses, and which

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could have been discovered by reasonable inspection. *Rutledge v. Swinney* (1913), 170 Mo. App. 251, 156 S. W. 478; *Cumberland Tel., etc., Co. v. Bills* (1904), 128 Fed. 272, 62 C. C. A. 620; *Dupree v. Tamborilla* (1902), 27 Tex. Civ. App. 603, 66 S. W. 595; *Jennison v. Waltham Gas Light Co.* (1909), 201 Mass. 352, 87 N. E. 594. In the absence of duty to inspect devolving on him, he does not assume risks of which he has no actual or constructive knowledge. *Arnold v. Connecticut Co.* (1910), 83 Conn. 97, 75 Atl. 78. If the lineman is required by his contract to make the inspection, he cannot re-

5. cover for injuries resulting from his failure to inspect properly. *Adams v. Central Ind. R. Co., supra*; *Junior v. Missouri Electric Light, etc., Co.* (1895), 127 Mo. 79, 29 S. W. 988.

The averments in the complaint before us are that the hanger was bent and defective, that it broke by reason of long use, defective condition, and

6. failure to inspect, that appellee knew of the defective and worn hangers along its line, that appellant had no knowledge of them, that appellee, knowing that the hanger on which appellant was required to work was likely to break, did not inform him of such hazard, that appellant had nothing to do with the construction, placement and maintenance of the hanger, had no knowledge of its defects, and had no cause or reason to apprehend its breaking. However, there is nothing in the complaint to show that the duty was on appellant to inspect, nothing to show that appellee did not maintain an independent inspecting force, on whose inspection it could rely. In such a case, the employe does not assume risks arising from the master's negligence. *Indianapolis Tel. Co. v. Sproul* (1912), 49 Ind. App. 613, 93 N. E. 463. In spite of the fact that the bent condition of the hanger must have been obvious,

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we do not believe that it can be said to appear from the complaint that the defect was obvious, since it does not necessarily follow that knowledge that the hanger was bent was knowledge that it was so defective as to break, and it is averred that appellant was not informed of the danger and had no knowledge. The averments are that the defect was caused by appellee's negligence, and that it negligently failed to warn appellant of the danger, and it does not appear that appellant was under a duty to inspect. Hence, as a matter of pleading, the complaint must be held sufficient. We are not here concerned with the evidence necessary to support it.

For the error in sustaining appellee's demurrer to appellant's complaint, the judgment is reversed.

NOTE.—Reported in 111 N. E. 198. As to master's duty to inspect, having thought for servant's safety, see 98 Am. St. 297. On liability of master for injury to electric lineman through defect in pole or its appurtenances see 21 L. R. A. (N. S.) 774; 26 L. R. A. (N. S.) 509. On duty to instruct servant as affected by his knowledge or experience see 44 L. R. A. 40. For different forms of statement of the general rule with respect to the master's duty as to places and appliances furnished to servant, see 6 L. R. A. (N. S.) 602. On duty of inspection by master, see 41 L. R. A. 70. As to the application of the doctrine of assumption of risk to a lineman, see Ann. Cas. 1912 B 467. As to the liability of a master for injuries to servant on the ground of failure to inspect the premises, where the duty of inspection is on the injured servant, see 17 Ann. Cas. 1087. See, also, under (1) 26 Cyc 1097; (2) 26 Cyc 1196; (3, 5) 26 Cyc 1204; (4) 26 Cyc 1196, 1204; (6) 26 Cyc 1386.



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FORT WAYNE BUILDERS SUPPLY COMPANY v.  
PFEIFFER ET AL.

[No. 8,943. Filed January 28, 1916.]

1. MORTGAGES.—*Foreclosure.—Equitable Right of Redemption.*—The general equitable right of redemption is barred by the decree of foreclosure. p. 618.
2. MORTGAGES.—*Foreclosure Sale.—Right of Redemption.—Junior Judgment Lien.*—Where plaintiff in a foreclosure suit, to which the holders of a junior judgment lien were made parties defendant, obtained a personal judgment against the mortgagor in addition to the other relief granted by the foreclosure decree, and in addition to the provision for sale the decree determined the status of the lien of such defendants, the sale thereunder, at which the plaintiff bid in the property for the amount of its judgment, interest and costs, was primarily to satisfy the judgment on plaintiff's mortgage, and was not a sale by the holders of the junior judgment lien so as to preclude them from the statutory right of redemption under §814 Burns 1914, §771 R. S. 1881. p. 618.
3. MORTGAGES.—*Foreclosure.—Redemption.—Affidavit.—Sufficiency.*—A redemption affidavit by junior judgment lienholders who were parties to the foreclosure proceeding, and who had the status of their lien established in the decree entered therein, was not insufficient, though it was irregular, in not specifically referring to and describing their judgment and in describing the foreclosure decree instead, since the affidavit could be aided by the contents of the instruments or public records mentioned or referred to therein. pp. 622, 624.
4. STATUTES.—*Remedial Statutes.—Construction.—Redemption from Judicial Sales.*—Statutes authorizing redemptions of real estate from judicial sales are remedial in character and, while strictly construed to determine the classes that come within their provisions, and the time for redemption, are liberally construed to make them effective as to those that come within their provisions. p. 624.
5. MORTGAGES.—*Foreclosure Sale.—Redemption.—Construction of Statute.*—Where the holder of a junior lien has tendered to the purchaser at foreclosure sale the full amount of his claim, the redemption will be sustained notwithstanding the affidavit was in some respects irregular, and especially where neither the mortgagor nor other junior lienholders are interposing any objection, since under such circumstances the statute authorizing such redemption will be liberally construed. p. 625.

From Allen Circuit Court; J. W. Eggeman, Judge.

Action by the Fort Wayne Builders Supply Company against Henry Pfeiffer and others. From a

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judgment for defendants, the plaintiff appeals. *Affirmed.*

*Leonard, Rose & Zollars*, for appellant.

*John H. Aiken* and *Underwood & Geake*, for appellees.

FELT, P. J.—This is a suit by appellant against appellees to quiet title to certain real estate. The complaint is in two paragraphs. The first is in the usual short form. The second contains the same general allegations as the first and in addition thereto sets out in detail the facts relied upon to show title, which facts involve two judicial sales of the real estate in controversy, one of which, to appellees, is alleged to be void. The appellees filed answer in general denial and also a cross-complaint against appellant in which they claimed to be the owners of the real estate and asked to have their title quieted. Appellant answered appellees' cross-complaint by general denial and by a paragraph in which it was alleged in substance that appellees were parties to a foreclosure suit by appellant in which the property in controversy had been sold at judicial sale and purchased by appellant; that appellees failed to bid at the sale but have attempted to redeem from it and to have a resale of the property at which they became the purchasers and on which they claim title; that such redemption and sale were void and appellees were estopped from redeeming from the sale in the foreclosure proceedings at which appellant became the purchaser. The court found for appellees and rendered judgment in their favor on their cross-complaint quieting their title to the real estate. Appellant's motion for a new trial was overruled and this appeal prayed and granted.

The error assigned and relied on for reversal is the overruling of the motion for a new trial. The

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substance of the motion is that (1) the decision of the court is not sustained by sufficient evidence; (2) the decision of the court is contrary to law and (3) error in the admission of evidence.

To comprehend the question presented requires a more detailed statement of the facts involved. William Bartenick was a building contractor and owned the land in controversy. Appellant recovered judgment against him in the Allen Circuit Court for materials and appellees obtained judgment against him in the Allen superior court. The real estate of Bartenick was encumbered by two mortgages. Appellant acquired the mortgages, brought suit to foreclose them and made defendants to that suit, the owners of the real estate, the appellees and their wives and other persons alleged to claim some interest in or lien upon the real estate. Appellees set up by way of cross-complaint, their judgment subsequent to the execution of the mortgages. Appellant obtained a personal judgment against Bartenick and the foreclosure of the mortgages against all the defendants. The decree also finds "that the defendants, Henry Pfeiffer, and Henry G. Pfeiffer, are the owners of a judgment for \$285.28" and fixes the priority of the claims of several parties to the suit. The decree provides first for the payment of costs, second for the payment of the amount due appellant on the judgment foreclosing the mortgages and third for payment of the overplus, if any, in a designated order of priority, in which appellees' claim is the sixth in order and was coördinate with a judgment in favor of appellant, other than the foreclosure judgment. Appellant ordered execution on the judgment and the sale was duly made on June 18, 1912. Appellant was the only bidder and the property was sold to it for the amount of the foreclosure judgment, accrued interest and costs.

On the last day of the year of the redemption, no other judgment creditor having redeemed, appellees filed their affidavit of redemption, paid the clerk of the court the amount of appellant's bid and eight per cent interest, obtained the clerk's certificate of redemption, ordered a writ of *venditioni exponas*, and caused the property to be resold to pay their judgment. The property was duly advertised and sold, appellees became the purchasers on September 17, 1913, and on the same day obtained the sheriff's deed for the property in due form and caused the same to be duly recorded. It also appears that after the sheriff's deed was executed to Henry Pfeiffer and Henry G. Pfeiffer, the latter and his wife duly executed a quitclaim deed to Henry Pfeiffer.

Appellant contends that (1) the sale at which it became the purchaser, was the sale of all the parties who had any lien against the real estate, including appellees; that appellees' only means of protecting their rights under their judgment was to bid at the sale; that it was their own sale and, therefore, they have no right to redeem from it; (2) that if appellees had any right to redeem, their affidavit of redemption was so indefinite and defective as to make the attempted redemption by them absolutely void.

The general equitable right of redemption is barred by the decree of foreclosure. Therefore, appellees'

right of redemption, if any, depends upon the

1. provisions of our statutes authorizing redemptions. *Eiceman v. Finch* (1881), 79 Ind. 511, 512; *Horn v. Indianapolis Nat. Bank*
2. (1890), 125 Ind. 381, 392, 25 N. E. 558, 21 Am. St. 231, 9 L. R. A. 676. Sections 811, 812, 813 Burns 1914, §§768, 769, 770 R. S. 1881, provide the manner of redemptions by owners of the property sold. Section 814 Burns 1914, §771 R. S.

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1881, provides: "In the absence of a redemption as above provided, by any owner, part owner, or person claiming under either, the real estate sold, or any parcel or parcels thereof sold in one body, may be redeemed at any time within one year from the date of sale, by any judgment creditor, his executors, administrators, or assigns holding a judgment or decree against the defendant whose title or interest shall have been sold, which, at the time he or they offer to redeem, shall be a lien upon such title or interest, and which shall be junior to the judgment under which the property was sold. Such redemption may be made by any person entitled thereto, without regard to the order of priorities of liens; and successive redemptions may be made by the several persons entitled to redeem, in the manner herein provided." Section 815 Burns 1914, §772 R. S. 1881, of the same statute among other things provides: "Any judgment creditor authorized by the preceding section to redeem, who shall desire to redeem from the purchaser at such sale, shall first file with the clerk of the court in whose office the certificate of purchase is required to be recorded, a statement, duly verified by his affidavit, or the affidavit of his agent or attorney, showing the court in which his judgment was rendered, the parties thereto, amount and date thereof, and amount due and unpaid thereon \* \* \* . He shall thereupon pay to such clerk, for the use of such purchaser, his executor, administrator, or assigns, the amount paid by such purchaser for the real estate \* \* \* . When such redemption has been made, any other judgment creditor, entitled and wishing to redeem, may do so by filing with said clerk a statement and affidavit similar to those above provided for, and containing, in addition, the name of the preceding redemptioner from whom he wishes to redeem,

and the particular parcels he wishes to redeem. He shall thereupon pay to such clerk, for the use of the last preceding redemptioner, if the lien of the latter be junior to that of the party now redeeming, his redemption money and interest at the rate of eight per cent per annum thereon and his costs of redemption; or if his lien be senior to that of the party seeking to redeem, he shall pay to the clerk, for the use aforesaid, the judgment of the last redemptioner on account of which his redemption was made and interest thereon, and his costs of suit in addition to the amounts aforesaid; and thereupon such clerk shall issue to him a certificate similar to the one above provided for, and record the statement, affidavit, and certificate in the 'Lis Pendens Record' aforesaid. Subsequent redemptions may be made by other judgment creditors entitled to redeem, substantially in the manner and upon the terms above provided."

As already shown, appellant obtained a personal judgment in the foreclosure suit in addition to the other relief granted it by the decree, while as to appellees the decree only finds that they had already acquired, and then owned, a judgment which was a junior lien on the real estate upon which the mortgages were foreclosed, and fixed the priority of liens and ordered the payment of the surplus, if any, derived from the sale, after paying the costs of the suit and the judgment rendered in appellant's favor on the mortgage debt. The sale was made on appellant's order for execution and in pursuance of the decree in the foreclosure suit brought by it. On this state of facts, we hold that the sale in question was made on appellant's order in pursuance of the decree of foreclosure and primarily to pay and satisfy appellant's judgment obtained on the mortgage indebtedness and the costs of the suit; that the pro-

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visions of the decree do not place appellees in such position as to make the sale theirs in the same sense that it is the sale of appellant, and that the effect of the provisions of the decree are not such as to deprive appellees of the statutory right of redemption, provided they have complied with the provisions of the statute. To so hold would be to render the statute meaningless. Cases cited by appellant to the effect that a party may not redeem from his own sale are not in conflict with this conclusion, for in all such cases brought to our attention the sale was made on the judgment or decree rendered in favor of the party who sought to redeem, while in the instant case the first sale was made on appellant's foreclosure decree, which only finds that appellees had previously acquired a judgment which was then a junior lien on the mortgaged premises, and fixed the priorities of all liens. *Davis v. Langsdale* (1872), 41 Ind. 399, 401.

The case most relied upon by appellant to support its contention, is that of *Horn v. Indianapolis Nat. Bank*, *supra*, and on page 394 of the opinion the distinction is recognized and clearly made as follows: "The appellee is clearly within the reason of the rule, and it is within the letter, for the judgment was entered in its favor as well as in favor of the other lien holders." As supporting our conclusion we cite: *Warford v. Sullivan* (1897), 147 Ind. 14, 21, 46 N. E. 27; *Luken v. Fickle* (1908), 42 Ind. App. 445, 458, 84 N. E. 561; *Hervey v. Krost* (1888), 116 Ind. 268, 277, 19 N. E. 125; *Becker v. Tell City Bank* (1895), 142 Ind. 99, 101, 41 N. E. 323.

The case of *Davis v. Langsdale*, *supra*, is on principle quite analogous to the one at bar, and the court sustained the right of redemption over objections similar to those of appellant, and among other things said: "The case is unlike that where a



sheriff has different executions in his hands in favor of different judgment plaintiffs, and sells on all the executions for the benefit of all the creditors.

\* \* \* Gay, having the first and paramount claim, could order the execution of the judgment, and direct the time and manner of it, within the requirements of the law, notwithstanding anything that Langsdale might or could do, and the sale, when made by his order, must, in consequence of the form of the judgment, be made for the benefit of Langsdale, so far as any surplus was concerned, after the payment of the amount due to Gay. It does not appear that Langsdale united in, or consented to, the sale, except by setting up his claim at the date of the judgment. This he was bound to do, having been made a party to the suit, or his lien would have been endangered, if not lost. \* \* \* We cannot think that under the circumstances, the sale to Gay can, in any fair sense, be regarded as the sale of Langsdale, \* \* \* although the surplus of the proceeds, after paying the claim of Gay, had there been any, might have been applied on his claim."

Having concluded that appellees had the right under the statute to redeem, it remains to be determined whether they so far complied with

3. its provisions as to make their attempt to redeem effective. On July 17, 1913, appellees filed with the clerk of the Allen Circuit Court, in whose office appellant's certificate of purchase, dated July 18, 1912, was duly recorded, a statement and affidavit in substance as follows: The undersigned states that as shown by the records of the Allen Circuit Court, appellant recovered judgment on May 9, 1912, against William and Elsie Bartenick, *et al.*, in cause No. 12,331; that appellant caused due process for the collection of said judgment to be issued to the sheriff of said county, and by virtue thereof on

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July 18, 1912, "certain real estate, a description of which appears in the records of said cause," was sold to the Fort Wayne Builders Supply Company, in satisfaction of its said judgment, the sheriff's return of which sale is duly entered on execution docket O, p. 64 of the records of said court; that "no redemption has as yet been made by any person claiming to be the owner of the equity in said real estate, and the undersigned now claims the right to redeem said real estate from such sale \* \* \* by reason of the following facts: They hold a judgment against said William Bartenick and Elsie Bartenick, dated May 9, 1912, in the sum of \$285.28 \* \* \*. That the undersigned now as such judgment lien holder, redeem from said sale and pay to the clerk of said court, the sum of \$4,802.86 being the amount of said sale and interest thereon." The statement was signed by Henry Pfeiffer and sworn to before the clerk of the Allen Circuit Court.

The gist of the objections urged by appellant to the sufficiency of the affidavit is that it does not show the parties to the suit and that it refers to the judgment in the foreclosure suit and not to the original judgment obtained by appellees against Bartenick; that it shows an attempt to have another sale under the judgment rendered in the foreclosure suit. Over appellant's objection the court admitted in evidence the transcript of said original judgment which showed a judgment in appellees' favor for \$248.08 against Bartenick. The court also received in evidence over appellant's objection the writ of *venditioni exponas* on which appellees' sale was made by the sheriff. Appellant shows in its brief that at the trial it was admitted that appellees paid to the clerk a sum sufficient to redeem the property from the foreclosure sale, and that appellant refused to accept the same. It was also ad-

mitted that both parties claim to derive title from William Bartenick by virtue of judicial sales and that he was the owner of the real estate when the judgment of foreclosure was rendered. It was also admitted that the sheriff received the writ of *venditioni exponas* on August 19, 1913, and after due advertisement sold the property to appellees on September 17, 1913, and on that day executed to them a deed for the real estate in controversy, which was duly delivered and recorded.

Statutes authorizing redemptions of real estate from judicial sales are remedial in character and while strictly construed to determine the

4. classes that come within their provisions, and the time for redemption, they are liberally construed to make them effective as to those who come within their provisions. *Hervey v. Krost, supra*; *Robertson v. Van Cleave* (1892), 129 Ind. 217, 224, 26 N. E. 899, 29 N. E. 781, 15 L. R. A. 68; *Davis v. Langsdale, supra*; *Green v. Stobo* (1889), 118 Ind. 332, 335, 20 N. E. 850; *Indianapolis, etc., Traction Co. v. Brennan* (1909), 174 Ind. 1, 17, 87 N. E. 215, 90 N. E. 65, 68, 91 N. E. 503, 30 L. R. A. (N. S.) 85; *Deal v. Plass* (1915), 59 Ind. App. 185, 109 N. E. 51; *Cincinnati, etc., R. Co. v. Shera* (1905), 36 Ind. App. 315, 318, 75 N. E. 293. The

affidavit of the redemptioner may be aided

3. by the contents of the instruments or public records mentioned or referred to therein.

*Robertson v. Van Cleave, supra*. The affidavit is defective and irregular in not specifically referring to and describing the judgment obtained by appellees against Bartenick, and in giving the amount of the judgment with accrued interest as stated in the foreclosure decree instead of the date and amount as stated in the original judgment. The reference, however, to that suit and the decree, and to the

records of the court made in the affidavit is sufficient, when considered in connection with the facts directly stated in the affidavit to show a substantial compliance with the statute as against the objections urged by appellant. In the foreclosure decree, judgment is not rendered in appellees' favor, but the decree finds that appellees already held a valid unsatisfied judgment against the owner of the mortgaged premises, and as appellant obtained the decree and had its mortgage declared senior to such judgment of appellees, the reference in the affidavit was sufficient to advise it of appellees' intention to redeem and have the property sold to satisfy the judgment held by them against Bartenick.

It is important in this connection to observe that appellant admits the timely payment by appellees of the full amount necessary to redeem from

5. its sale, also that neither of the other junior lien holders nor the mortgagors are interposing any objection to the redemption by appellees. The policy of the law is to provide means by which the property of a debtor may go as far as possible toward the payment of his obligations, and as against the objections of a creditor who has received, or been tendered the full amount of his claim, the courts will apply the liberal rule of construction in favor of an attempted redemption which tends to accomplish this benign purpose of the law. The objections of appellant to the sufficiency of appellees' redemption affidavit, while showing inaccuracies and irregularities, are not sufficient to avoid the redemption, and it therefore follows that the other objections based on appellant's construction of the affidavit and redemption proceedings are likewise untenable and need not be further considered. *Davis v. Langsdale, supra; Hervey v. Krost, supra.* The

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case seems to have been fairly tried on its merits and a correct result reached. No intervening error has been pointed out which deprived appellant of any substantial right. *Friebe v. Elder* (1914), 181 Ind. 597, 609, 105 N. E. 151. Judgment affirmed. Ibach, C. J., Caldwell, Moran, Shea and Hottel, JJ., concur.

NOTE.—Reported in 111 N. E. 192. As to right of redemption from mortgage, etc., sales, see 21 Am. St. 245. See, also, under (1) 27 Cyc 1788; (2) 27 Cyc 1797; (4) 27 Cyc 1800; (5) 27 Cyc 1835.

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P. B. ARNOLD COMPANY v. BUCHANAN.

[No. 8,930. Filed January 28, 1916.]

1. LANDLORD AND TENANT.—*Use of Premises.—Injuries from Dangerous Condition.—Action.—Instruction.*—In a tenant's action for personal injuries from a defect in the rented premises, an instruction that the averments in the complaint descriptive of the injuries were material averments, but that it was not necessary for plaintiff to prove all such averments as to injury if any of the injuries were proved by a preponderance of the evidence, was not objectionable as failing to inform the jury what elements were necessary to be made out, since it was directed solely to the subject of the necessity of proving all the averments on the subject of injury, and in that respect stated the law correctly. p. 629.
2. LANDLORD AND TENANT.—*Tenant's Right to Possession.—Default in Payment of Rent.*—Where a tenant makes proper effort to pay rent at the time and place when due, but is prevented from doing so by the acts and conduct of the landlord, such default does not deprive the tenant of the right to the possession of the rented premises. p. 631.
3. LANDLORD AND TENANT.—*Default in Payment of Rent.—Notice to Vacate.—Extension of Tenancy.*—A notice given to a tenant on default in payment of rent, expressly notifying the tenant to deliver up the possession at the expiration of ten days from the time of receiving the notice, "unless the rent now due is paid within said time", operates to waive any right which the landlord may have to immediate possession by reason of such default, and extends both the time of payment and the tenancy for a period of ten days. p. 632.
4. DAMAGES.—*Injury to Wife.—Instruction.*—In a married woman's action against her landlord for personal injuries caused by a defect in the premises, where the complaint showed that plaintiff

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was employed by an electrical company, and the only evidence on the subject of wages earned by plaintiff had relation to the wages she earned by reason of such employment, an instruction telling the jury that in determining the amount of damages to be awarded it had a right to consider plaintiff's loss of time and wages, if any, did not authorize the consideration of loss of time or wages for which the husband would be entitled to recover, and was properly given. pp. 633, 634.

5. HUSBAND AND WIFE.—*Property Rights of Wife.—Rights to Earnings and Proceeds of Suit.—Statutes.*—Under §§7867, 7868 Burns 1914, §§5130, 5131 R. S. 1881, the earnings and profits of a married woman accruing from her trade, business, services or labor, other than labor for her husband or family, are her sole property, and she may maintain an action in her own name for damages for any injury to her person the same as if she were sole and the money recovered shall be her separate property. p. 633.
6. APPEAL.—*Review.—Instructions.—Duty to Request.*—In a wife's action for personal injuries, where the complaint alleged that plaintiff was employed by an electrical firm, and there was no evidence as to loss of wages except as to wages earned in such employment, defendant should have requested an instruction advising the jury that plaintiff could not recover for loss of time or services belonging to her husband, if such was deemed necessary for the protection of its interests. p. 634.
7. APPEAL.—*Review.—Harmless Error.—Instructions.*—“Approximately”.—“Proximately”.—The words “approximately” and “proximately” are so nearly synonymous that the use of the word “approximately” in an instruction instead of the word “proximately”, did not render the instruction fatally defective. p. 634.
8. APPEAL.—*Review.—Refusal of Instructions.*—There is no error in the refusal of an instruction which, in so far as it was correct, was fully covered by instructions given. p. 635.
9. NEGLIGENCE.—*Repairing Occupied Rooms.*—Where defendant was employed to repair rooms which it knew to be occupied, its knowledge imposed upon it a duty to use ordinary care with reference to the occupants, regardless of whether the occupancy was lawful or otherwise. p. 635.

From Superior Court of Allen County; *Carl Yapple*, Judge.

Action by Clarise J. Buchanan against the P. B. Arnold Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

*Ballou, Hoffman & Romberg*, for appellant.

*Wm. C. Ryan, C. B. Aldrich and Emrick & Emrick*, for appellee.

HOTTEL, J.—This is an appeal from a judgment for \$300 in appellee's favor in an action brought by her against Preston B. Arnold and Earl Arnold, doing business under the firm name of P. B. Arnold & Co., and Flora Weis, to recover damages for personal injuries alleged to have resulted from the negligence of the defendants. During the progress of the trial, the action was dismissed as to the defendant Flora Weis and by agreement of the parties the appellant, "P. B. Arnold Company", a corporation, was substituted below as party defendant instead of Preston B. Arnold and Earl Arnold. The errors assigned and relied on for reversal in this court and presented by appellant's brief are the overruling of appellant's motion for judgment on the answers to interrogatories and its motion for a new trial.

The averments of the complaint necessary to an understanding of the questions herein considered are in substance, as follows: On November 5, 1911, Flora Weis was the owner of a lot in the city of Fort Wayne, Indiana, on which was located a two-story building, and on that day appellee and her husband rented and leased from said Weis three rooms on the second floor of said building and agreed to pay, and did pay, therefor, \$5 per month. Appellee and her husband and son occupied said rooms until March 17, 1912. During that period appellee was employed at the General Electric Works in said city. On March 13, 1912, she went to her work as usual, and before leaving her rooms she securely locked the doors. While she was away and so engaged, said Weis employed appellant to make certain repairs to the first story of said house. During appellee's absence, appellant entered her rooms without her knowledge or consent and removed some boards from the floor of her bedroom and



negligently left a hole in the floor about two feet square. Appellee returned from her work that evening about 7 o'clock, and, not knowing that anyone had been in her rooms, entered the same. It was then dark and she went into the bedroom to turn on the light and stepped into said hole made by the appellant, which caused her to fall forward against the iron bars of the foot of the bed that was in said bedroom, fracturing her jaw, dislocating her left leg, etc. Said injuries were occasioned wholly by the careless, negligent and wrongful acts of appellants and each and all of them, and without any fault or negligence on the part of appellee.

We will first consider the questions presented by appellant's motion for a new trial. Complaint is made of instructions Nos. 1, 2, 3, 4 and 5

1. given at request of appellee. Instruction No.

1 reads, as follows: "The averments in the complaint descriptive of the injuries claimed to have been sustained by the plaintiff are material averments, but the court instructs you that it is not necessary for the plaintiff to prove all such averments as to injury. If any of the injuries are proved by (a) preponderance of the evidence and the other elements of plaintiff's case have been made out by (a) preponderance of the evidence, and the defense of contributory negligence had not been established by the evidence, you will find for the plaintiff." The objection to this instruction is, that it fails to inform the jury what the elements of the plaintiff's case are, that are necessary to be made out; and that for this reason it is indefinite, uncertain and misleading. It is not contended that the instruction was erroneous, nor does appellant indicate in what way the jury could have been misled thereby. The instruction does not purport to enumerate the elements essential to the cause of action stated in the

complaint, but is directed to the subject of the necessity of proving all the averments contained therein on the subject of injury, and, in such respects, states the law correctly. As to the other elements essential to appellee's cause of action, appellant's rights were completely safeguarded by other instructions as favorable to appellant as the law applicable thereto would warrant.

Appellee's instructions Nos. 2 and 4, each relate to the subject of her possession of the premises in question at the time of her injury and present what appellant seems to regard as the controlling question of the appeal. They are as follows: 2. "One of the questions in this case is as to whether the plaintiff was in lawful possession of the premises described in the complaint at the time of the injury averred. The plaintiff contends that she was in lawful possession by reason of the contract of tenancy, and was such lawful occupant on the fourteenth day of March, 1912. The defendants assert that the tenancy had expired previous to the injury, that is to say on the fourth day of March, 1912. It is admitted that the injury, if any, occurred on March 14, 1912. The court instructs you that if the plaintiff rented the premises for an indefinite time, with rent payable monthly, on the fourth day of each month, in advance, then it was the duty of the plaintiff on the fourth day of March, 1912, to pay or tender to the defendant, Weis, the rent due on said day. The court further instructs you that if the plaintiff on said day sought the defendant, Weis, for the purpose of tendering the money for the rent for the month commencing March 4, 1912, and was ready and willing to pay the same, but by reason of the absence of the defendant, Weis, if the evidence shows such absence, was prevented from paying such rent or tendering

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the same and you further find from the evidence that the plaintiff made reasonable effort on the day the rent became due, to offer and tender the rent due, at place where it was to be paid, and by acts of defendant, Weis, was prevented from so doing, if she was so prevented, all of said acts and facts to be proved by the plaintiff by preponderance of the evidence, then the court instructs you that the plaintiff was in the rightful possession of the premises."

4. "On the question as to whether the plaintiff was in rightful possession of the premises, on the fourteenth day of March, 1912, the court further instructs you that if the plaintiff rented the premises for an indefinite time, with the rent payable monthly in advance on the fourth day of each month and you further find by preponderance of the evidence the following facts, if facts they are, that on the fifth day of March, 1912, the rent, so payable in advance had not been paid, (or) properly tendered, and on said day the defendant, Weis, served upon the plaintiff in this case, a written notice to deliver up possession of the property, in ten days or pay the rent then due, then the court instructs you that the plaintiff would not be in unlawful possession of said premises, until the expiration of ten days from the time of service of said notice." Appellant's first objection to instruction No. 2, *supra*, stated in its own language, is as follows: "The fact that on March 4, the tenant attempted to make a payment of the rent, certainly would not make the tenant in lawful possession on March 14, when the injury is alleged to have occurred. Especially when it is shown that thereafter a written notice was served upon the plaintiff to pay the rent or vacate, and when the fact is found by the jury that this rent never

2. was paid." Appellant must concede, and we assume, that such is the effect of its conten-

tion, that even though appellee failed to pay the rent when due, if she made a proper effort to pay, at the time and place of payment, and was prevented from doing so by the acts and conduct of her landlord, such default in payment would not deprive appellee of her right to possession. Appellant, however, attaches importance to the fact that the instruction told the jury in effect that if it found the facts to be as indicated in the instruction the appellee was in the rightful possession of the premises *when she was injured, which was on March 14*, and ten days after said default in payment of rent, and that the evidence showed that on March 5 the landlord, Mrs. Weis, served notice on appellee to deliver up possession of the premises. Assuming,

without deciding, that after a proper effort

3. to pay the rent due and failure because of the landlord's acts and conduct, it was appellee's duty in order to retain her right to possession to stand ready and willing to pay the delinquent rent upon demand by the landlord, the notice in question was not such a demand. The notice is undisputed. It bears date, March 5, 1912, and by its express language notifies appellee "*to deliver up*  
\* \* \* *at the expiration of ten days from the time of the receiving of this notice the possession of the following described property, to wit: \* \* \**  
*unless the rent now due is paid within said time.*"

Regardless of who was to blame for the default in the payment of rent due, the effect of this notice was to waive any right to immediate possession, which the landlord may have had on account of such default, and to extend the time of payment ten days and continue the tenancy for the same period, which took it beyond the date of appellee's injury. As affecting said question of waiver see, *Merrell v. Garver* (1913), 54 Ind. App. 514, 101 N. E. 152;

*Templer v. Muncie Lodge, etc.*, (1912), 50 Ind. App. 324, 97 N. E. 546. It follows that the objection indicated to said instruction can be of no avail. Other objections are made to this instruction, but they are untenable and need not be considered. What we have said in disposing of instruction No. 2, likewise disposes of instructions Nos. 3 and 4.

Appellant complains of that part of instruction No. 5 which reads, as follows: "In determining the amount of damages to be awarded you have a

4. right to consider the nature of the injury, if any, loss of time, if any, *loss of wages*, if any, together with any physical pain or mental anguish that the plaintiff may have endured, you have a right to consider the effect of such injury upon her health, if any, and as to whether the injury, if any, will be permanent or temporary. All injury must be approximately produced by the negligent acts complained of \* \* \* ." Appellant contends that such instruction is erroneous, (1) because a married woman may not recover for loss of time or loss of wages; and (2) that part of the instruction which reads: "All injury must be *approximately* produced by the negligent acts complained of" is erroneous and misleading. Since the enactment of the statute of 1879 (§§7867, 7868 Burns 1914, §§5130, 5131 R. S. 1881), the earnings and

5. profits of any married woman, accruing from her trade, business, services or labor, other than labor for her husband or family, are her sole property, and she may maintain an action in her own name against any person or body corporate for damages for any injury to her person the same as if she were sole and the money recovered shall be her separate property. *Kennedy v. Swisher* (1905), 34 Ind. App. 676, 73 N. E. 724; *Arnold v. Rifner* (1896), 16 Ind. App. 442, 45 N. E. 618; *Elliott v. Atkinson*

(1910), 45 Ind. App. 290, 90 N. E. 779. The

averments of the complaint show that ap-  
4. pellee was employed at the General Electric Company of Fort Wayne, Indiana, and the only evidence in the case on the subject of *wages* earned by appellee is that relating to the *wages* which such company paid her for services rendered it. There was no evidence relating to the subject of *wages* earned by appellee in her home working for her husband or family. In view of the averments of the complaint and the evidence it was entirely proper for the court to tell the jury that in determining the amount of damages to be awarded it "*had a right to consider*" appellee's loss of time and wages, if any. If appellant thought it necessary to protect its interest to have an instruction expressly

6. telling the jury that appellee could not recover for any damages which might result to the husband, on account of any loss of appellee's time or service, resulting from her injuries, it should have tendered such instruction. There is nothing in the instruction complained of that authorizes the jury to consider any such loss of time or wages.

The instruction is open to the criticism, *supra*,

7. that the word "*approximately*" is used where "*proximately*" should have been used; but the words are so nearly synonymous in meaning that the use of the less appropriate word in this case could not have had the slightest influence or effect on the verdict reached by the jury, and hence could not have harmed appellant. *Pledger v. Chicago, etc., R. Co.* (1903), 69 Neb. 456, 95 N. W. 1057, 1060; 1 Words and Phrases 477; §§405, 700 Burns 1914, §§396, 658 R. S. 1881.

Appellant also complains of the court's refusal to give its instruction No. 15. It is sufficient to say that this instruction, to the extent that it was

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proper, was covered by others given at ap-  
 8. pellant's request. The instructions taken as a whole were very favorable to appellant, indeed, more favorable than the law justifies.

The instructions above set out disclose that under them appellee's right to recover was made to depend on whether she had defaulted in the  
 9. payment of her rent and thereby lost her right to lawful possession of the premises in question. They ignore any possibility of appellee's right to recover against appellant, except she was lawfully entitled to possession of said premises. This is true of all the instructions tendered by either appellant or appellee, and in determining the correctness of the instructions on such subject we have limited our consideration of them to the objections made against them, and considered them solely with reference to the theory of liability adopted by the parties and the trial court, with no intention of intimating that such theory was correct. Upon such theory, the instructions were as favorable to appellant as the law would permit, and the theory itself more favorable. This is so because there was evidence showing that when appellant entered the rooms occupied by appellee and made the hole in the floor, into which appellee stepped, it knew some one occupied the rooms, and the jury found in answer to the interrogatories that the appellant knew when it started to wire said house on March 14, 1912, that some one was *lawfully living* in the upstairs rooms. Whether such occupancy was lawful or unlawful, appellant could not ignore its knowledge thereof, and such knowledge imposed on it a duty to use ordinary care with reference to such occupants. *Peru Heating Co. v. Lenhart* (1911), 48 Ind. App. 319, 326, 95 N. E. 680; *Cleveland, etc., R. Co. v. Means* (1915), 59 Ind. App. 383, 104 N. E. 785, 108 N. E. 375;



*Donnelly v. Hufschmidt* (1889), 79 Cal. 74, 21 Pac. 546; *City of Shawnee v. Cheek* (1913), 41 Okl. 227, 137 Pac. 724, 51 L. R. A. (N. S.) 672, 675, Ann. Cas. 1915 C 290.

The answers to interrogatories are in the main entirely consistent with the general verdict, and any apparent inconsistency between the two is not of that irreconcilable character necessary to warrant a judgment on such answers.

We find no error in the record, the judgment below is therefore affirmed.

NOTE.—Reported in 111 N. E. 204. As to liability of landlord for letting dangerous premises, see 66 Am. St. 785. On the right of married woman to recover for loss of time, services, wages or impaired capacity to labor, see 20 L. R. A. (N. S.) 215; 4 Ann. Cas. 205. See, also, under (2) 24 Cyc 1352; (3) 24 Cyc 1360; (4) 21 Cyc 1574; (5) 21 Cyc 1393, 1526; (6) 3 C. J. 850; 38 Cyc 1693; (7) 38 Cyc 1595; (8) 38 Cyc 1711; (9) 29 Cyc 443.

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### THE PENNSYLVANIA COMPANY v. REESOR, ADMINISTRATOR.

[No. 8,469. Filed May 25, 1915. Rehearing denied October 13, 1915. Transfer denied February 2, 1916.]

1. TRIAL.—*Verdict*.—*Effect*.—In a personal injury case, a verdict for plaintiff on a paragraph of complaint grounded on negligence is in effect a finding against plaintiff on a paragraph alleging wilful injury. p. 641.
2. NEGLIGENCE.—*Trial*.—*Verdict*.—*Answers to Interrogatories*.—*Wilful Injury*.—A verdict on a paragraph of complaint charging negligence can not stand as against the jury's special finding that the injury was wilfully inflicted. p. 642.
3. TRIAL.—*Interrogatories to Jury*.—Under §572 Burns 1914, Acts 1897 p. 128, providing for the submission of interrogatories to the jury, interrogatories calling for a conclusion of law should not be submitted. p. 642.
4. APPEAL.—*Review*.—*Answers to Interrogatories*.—"Wilfully".—"Intentionally".—"Or".—An interrogatory submitted to the jury in a personal injury case asking whether the engineer in charge of defendant's train "wilfully or intentionally" ran the engine upon decedent, to which the jury answered "yes", can not be considered in determining whether a verdict for plaintiff on the theory of negli-

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gence is overcome by the answers to interrogatories, since "wilfully" and "intentionally" are not synonymous, and an injury may result from intentional misconduct without containing the element of wilfulness, and the word "or" is a disjunctive conjunction coordinating words or clauses each of which in turn is regarded as excluding consideration of the other or others; while on the other hand, regarding the words as synonymous, the question calls for a conclusion of law. p. 643.

5. PLEADING — *Judgment on Pleadings.* — *Statutes*—Under §592 Burns 1914, §566 R. S. 1881, providing for judgment on the pleadings though a verdict has been returned against the party entitled thereto, a defendant is not entitled to a judgment on the pleadings where the verdict is based on a paragraph of complaint which was good against demurrer. p. 646.
6. RAILROADS.—*Injuries to Persons on Tracks.*—*Complaint.*—A paragraph of complaint alleging that decedent was walking east on defendant's south track when defendant's east bound train was approaching, and that its west bound train was approaching and passing on the other track, that the noise of the west bound train prevented him from hearing the approach of the train running east, and that the engineer of the latter train, when more than 800 feet away from decedent, saw him and discovered that he was in peril and unaware thereof, and discovered his peril in time, by the exercise of ordinary care, to have avoided the injury, but negligently failed to do so, and negligently ran into and killed decedent, was sufficient on demurrer. p. 646.
7. APPEAL.—*Review.*—*Harmless Error.*—*Admission of Evidence.*—In an action for the death of one who was run down by defendant's train while he was walking upon the tracks, in which decedent's want of due care was conceded, the admission of evidence to show that the track at the point where decedent was killed had been used for a number of years by many people as a thoroughfare was not prejudicial error. p. 647.
8. RAILROADS.—*Injuries to Persons on Tracks.*—*Evidence.*—*Contributory Negligence.*—In an action for the death of one who was run down by a train while walking on defendant's tracks, predicated on the theory of last clear chance, the admission of evidence to show that at the time of entering upon the tracks at a public street crossing decedent received no warning was proper, since under the issues the question of decedent's knowledge of the danger was important, in view of the fact that if decedent had actual knowledge of immediate danger and voluntarily encountered it he would have been guilty of such contributory negligence as to preclude recovery, while, if unconscious of the danger, the doctrine of last clear chance would apply. p. 647.
9. DEATH.—*Right of Recovery.*—*Pecuniary Loss.*—In an action to recover damages for a wrongful death the recovery must be based on the theory that the next of kin have sustained a pecuniary loss,

and it need neither be shown nor exist that decedent was under any legal obligation to contribute to the support of his next of kin. p. 648.

10. **DEATH.—Action.—Evidence.**—In an action for the benefit of the next of kin to recover damages for a wrongful death, all the facts and circumstances surrounding the parties and those showing the ability and probable inclination of decedent to continue contributions to his next of kin are admissible. p. 648.
11. **APPEAL.—Review.—Refusal of Interrogatories to Jury.**—There was no error in refusing to submit certain interrogatories to the jury, where the findings in answer to interrogatories submitted covered all the elements in the case as well as all the essential elements of the interrogatories refused. p. 649.
12. **RAILROADS.—Injuries to Persons on Tracks.—Last Clear Chance.—Instructions.**—In an action, predicated on the doctrine of last clear chance, to recover for the death of one killed while walking on defendant's railroad tracks, an instruction stating the law upon the theory that, although decedent failed to exercise due care up to the moment of his injury, there could be a recovery if the engineer realized the danger of decedent, and knew that decedent was unconscious of his danger, and failed to use ordinary care to avoid injuring him, was not objectionable as failing to advise the jury that decedent was obliged to use ordinary care; nor was it erroneous as omitting the question of negligence and a definition of ordinary care, in view of another instruction fully explaining the care required of the engineer. pp. 650, 651.
13. **NEGLIGENCE.—Last Clear Chance.—Contributory Negligence.**—Where the doctrine of last clear chance is applicable, the existence of negligence on the part of the injured person, or his failure to use due care, will not in all cases defeat a recovery. p. 651.
14. **RAILROADS.—Injuries to Persons on Track.—Instructions.—Last Clear Chance.**—In an action for the death of a person who was run down by one of defendant's trains, an instruction advising the jury that if the engineer actually saw decedent upon the track and thereafter realized decedent's perilous situation and that he was unconscious of his danger, or if by the exercise of due care the engineer could have known of decedent's peril and his unconsciousness thereof, such engineer could not indulge the presumption that decedent would leave the track in time to avoid injury, and was required to use all the means at hand and under his control to avoid the injury, did not charge defendant with the duty of using ordinary care to discover decedent on the track in the first instance, and was not misleading to the jury. p. 652.
15. **RAILROADS.—Injuries to Persons on Tracks.—Negligence.—Last Clear Chance.**—Under the rule of last clear chance, as applied in an action for the death of a person killed while walking on defendant's tracks, if defendant's engineman actually saw decedent on the track, and realized or should have realized his peril by the exercise of

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ordinary care, then such engineman was charged with ordinary care to discover whether decedent was conscious of his danger, and to use all the means at hand and under his control to avoid the injury, and his failure to exercise ordinary care under such circumstances, and in such particulars, was negligence constituting the proximate cause of the injury, and the want of due care by decedent was the remote cause. p. 653.

16. **APPEAL.—Review.—Harmless Error.—Instructions.**—There was no prejudicial error in the giving of instructions upon the theory of a wilful injury, where the verdict was expressly upon a paragraph of complaint based on negligence. p. 654.
17. **APPEAL.—Review.—Refusal of Instructions.**—Reversible error can not be predicated on the refusal of instructions on the subject of wilful injury, where the finding was in appellant's favor on that theory of the case, nor in the refusal of instructions that were fully covered by the instructions given. p. 654.
18. **RAILROADS.—Injuries to Persons on Tracks.—Evidence.—Sufficiency.**—Evidence showing that decedent entered upon defendant's track at a public street crossing, and while walking east on the track a train approached from the east on the adjoining track which prevented decedent from hearing the approach of a train from the west on the track on which he was walking, that proper signals were not given, and that the engineer knew that decedent was unconscious of his peril, etc., was sufficient to sustain a verdict for plaintiff. p. 655.

From Gibson Circuit Court; *Herdie F. Clements*, Judge.

Action by G. F. Reesor, Administrator of the estate of A. F. Reesor, deceased, against The Pennsylvania Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

*John E. Iglehart, Edwin Taylor, Embree & Embree and E. H. Iglehart*, for appellant.

*Miller & Miller, John W. Brady and Phelps F. Darby*, for appellee.

**SHEA, C. J.**—Appellee, as administrator, brought this action to recover damages for the death of his decedent, who was struck and killed by a train of appellant in the city of Valparaiso, Indiana, on July 27, 1908. The cause was tried on the third and fourth paragraphs of amended complaint. The

third paragraph is predicated upon the theory of wilful injury. Inasmuch as the verdict of the jury is based wholly on the fourth paragraph, the third is not set out in this opinion. The fourth paragraph alleges in substance that in July, 1908, decedent was a student at Valparaiso University in the city of Valparaiso, Indiana; that appellant's double track line of railroad and right of way adjoins the grounds of the university at and near the crossing of Greenwich Street in said city; that on the evening of July 27, 1908, between six and seven o'clock, decedent was walking east on appellant's south track near said Greenwich Street crossing within the corporate limits of the city; that at the same time a passenger train operated by appellant was approaching decedent on the south track from the west, one of its trains from the east was approaching and passing decedent on appellant's north track; that the noise of the passing train running west prevented decedent from hearing the approach of the train running east, and on that account he did not at any time know that he was in danger of being run over by said train; that the engineer in charge of the train running east, when more than 800 feet away from decedent, saw him on the track in front of the train, and then and there discovered that he was in peril and unaware thereof, and continuously thereafter observed him on the track, and realized his danger; that said engineer "discovered said peril in time, by the exercise of ordinary care to have avoided the injury to said decedent, but negligently failed to do so, and defendant, by its agents and servants then and there carelessly and negligently ran said locomotive and train of cars against and over decedent," thereby causing his injuries and death; that appellant's agents and servants operating said locomotive and train were engaged in the discharge of

their respective duties and acting in the line of their employment; that decedent was 22 years old, of sound health and large earning capacity, and left his father and mother and brothers and sisters as next of kin, for whose benefit the action was instituted. Demurrers to each of these paragraphs were overruled. An answer in general denial formed the issues submitted to a jury for trial, resulting in verdict and judgment for appellee. With its general verdict, the jury returned answers to certain interrogatories.

It is assigned that the court erred in overruling, (1) appellant's motion for judgment on the facts found in answer to the interrogatories notwithstanding the general verdict; (2) its motion for judgment notwithstanding the general verdict (on the pleadings); (3) its demurrer to each the third and fourth paragraphs of amended complaint; (4) its motion for a new trial; (5) its motion in arrest of judgment.

The first question presented and argued is the alleged error of the court in overruling the motion for judgment on the facts found in answer

1. to the special interrogatories submitted, notwithstanding the general verdict. The trial court submitted forms of verdict to the jury, which returned a general verdict, finding for appellee on his fourth paragraph of complaint. No objection is presented as to the form of the verdict. It is correctly argued by appellant that this finding of the jury was in effect a finding against appellee on the third paragraph of the complaint. This is fully sustained by the following authorities. *Central Union Tel. Co. v. Fehring* (1896), 146 Ind. 189, 193; 45 N. E. 64; *Union Central Life Ins. Co. v. Huyck* (1892), 5 Ind. App. 474, 32 N. E. 580. The fourth paragraph of the complaint on which the verdict

rests, appellee insists, is drawn on the theory

2. that the injury was due to the negligence of appellant, invoking the doctrine of last clear chance. Interrogatory No. 38 and the answer thereto read as follows: "Did said John Bechtol as such engineer 'wilfully or intentionally' run said engine upon or cause it to strike said A. F. Reesor? A. Yes." It is argued that this finding is in such irreconcilable conflict with the general verdict that both can not stand, and, therefore, the motion should have been sustained. It is well settled that the doctrine of wilfulness and negligence are antagonistic, and can not be reconciled, therefore, appellant contends if the injury complained of was wilfully committed, a verdict based upon the fourth paragraph of complaint charging negligence can not stand, and the motion should have been sustained. The following authorities sustain this contention. *Barrett v. Cleveland, etc., R. Co.* (1911), 48 Ind. App. 668, 96 N. E. 490; *Louisville, etc., R. Co. v. Bryan* (1886), 107 Ind. 51, 54, 7 N. E. 807; *Miller v. Miller* (1897), 17 Ind. App. 605, 47 N. E. 338; *Gregory v. Cleveland, etc., R. Co.* (1887), 112 Ind. 385, 14 N. E. 228. Appellant's position in this respect is sound, and must be upheld if the interrogatory submitted was a proper one, and the fact elicited thereby can be considered by this court. The statute under which interrogatories are authorized

3. to be submitted to the jury, being §572 Burns 1914, Acts 1897 p. 128, provides that when "requested by either party, the court shall instruct them (the jury) when they render a general verdict to find specially upon particular questions of fact to be stated to them in writing in the form of interrogatories on any or all the issues in the cause." It is argued that this interrogatory is improper for the reason that it called for a conclusion of law.



The theory upon which interrogatories are submitted to the jury, as above stated, is violated by the submission of one that calls for a conclusion of law, for it is never the province of the jury to determine by answers to interrogatories questions of law. Facts only should be sought, as the statute clearly contemplates. *Tippecanoe Loan, etc., Co. v. Jester* (1913), 180 Ind. 357, 375, 101 N. E. 915, L. R. A. 1915 E 721; *Board, etc. v. Bonebrake* (1896), 146 Ind. 311, 317, 45 N. E. 470; *Avery v. Nordyke & Marmon Co.* (1905), 34 Ind. App. 541, 558, 70 N. E. 888; *Insurance Co. v. Osborn* (1901), 26 Ind. App. 88, 92, 59 N. E. 181; *Chicago, etc., R. Co. v. Ostrander* (1888), 116 Ind. 259, 15 N. E. 227, 19 N. E. 110. This interrogatory is subject to

criticism for another reason. It presents to

4. the jury two propositions which are in some measure at least conflicting. It asks the jury to state whether the injury was "wilfully or intentionally" inflicted. Injury may result from intentional misconduct, with heedlessness as to consequences, without containing the element of wilfulness. For instance, there may be an intentional omission to perform some duty, which results in an injury, which could not be termed wilfulness, as there may be an intentional omission to give the proper signals in approaching a person upon a railway track, which results in injury. It might be reasoned from this that the injury itself was intentionally inflicted, and yet the element of wilfulness may be lacking.

"Wilfulness" is variously defined as follows: "The words 'wilful' and 'wilfully' are of somewhat varied signification according to the context in which they are used in some particular cases, and the nature of the subject under discussion or treatment. They are frequently used in the sense of in-

tentionally, or, in other words, as implying a purpose or design, or proceeding from a conscious motion of the will as distinguished from accidentally or involuntarily, and they are accordingly used in the sense of or as equivalent to willingly; designedly; purposely; obstinately; stubbornly; inflexibly; perversely; voluntarily; deliberately; with set purpose, being governed by the will without regard to reason, or without yielding to reason. But 'wilfully' has been held not to be the equivalent of 'feloniously', 'unlawfully', 'falsely' or 'corruptly' ". 40 Cyc 938. Century Dictionary defines "intent" as follows: "Personal intention; the state of mind in respect of intelligent volition; the voluntary purposing of an act: often distinguishable from the motive which led to the formation of the intent. The tendency imputable by law to an act; the constructive purpose of an action, for which the doer may be responsible, although the actual intent was not wrongful." "Wilfully" is defined as follows: "By design; with set purpose, intentionally; especially, in a wilful manner, as following one's own will; selfishly; perversely; obstinately; stubbornly." Century Dictionary.

In the case of *Coal Bluff Min. Co. v. McMahon* (1913), 54 Ind. App. 131, 136, 102 N. E. 862, the court in discussing the subject said: "There may be intentional misconduct which is in no sense wilful. Wilful misconduct includes both intentional and wrongful action, so we think the language of the statute does not require that the complaint shall charge wilful misconduct, either with respect to the omission to perform duties, or with respect to the violation of the provisions of the statute mentioned. There is a clear distinction between the wilful failure to comply with the provisions of a statute and a mere omission of duty with respect to such statute."

In the case of *Barrett v. Cleveland, etc., R. Co.*, *supra*, 673, the court quotes with approval from the case of *Louisville, etc., R. Co. v. Bryan, supra*, the following language: "To constitute a wilful injury, the act which produced it must have been intentional, or must have been done under such circumstances as evinced a reckless disregard for the safety of others, and a willingness to inflict the injury complained of. It involves conduct which is *quasi* criminal." *Chicago, etc., R. Co. v. Nash* (1890), 1 Ind. App. 298, 27 N. E. 564; *State v. Roth* (1913), 162 Iowa 638, 144 N. W. 339, 50 L. R. A. (N. S.) 841; *Birmingham R., etc., Co. v. Taylor* (1913), 6 Ala. App. 661, 60 South. 979; *Southern R. Co. v. McNeely* (1909), 44 Ind. App. 126, 88 N. E. 710, 714; *Brooks v. Pittsburgh, etc., R. Co.* (1902), 158 Ind. 62, 62 N. E. 694. If we could treat the words "wilfully" and "intentionally" as synonymous, as appellant seems to do in its very able brief, and for which there is some justification when the full import of the question is considered, we must conclude that since the word "wilfully" is the broader term, and generally includes the element of intention, therefore, the jury was in effect asked to find whether the act was wilfully done. This being true, it calls for a conclusion of law, and is objectionable. However, it will be observed that the words are separated by the disjunctive "or", therefore, we conclude that the question was probably drawn upon the theory that the words were not synonymous. The word "or" is defined in the Century Dictionary as a "Disjunctive conjunction coördinating two or more words or clauses each one of which in turn is regarded as excluding consideration of the other or others." The question thus considered is double in form and is, therefore, misleading and confusing. It submits to the jury the task of determining the

distinction between the two words, which the jury does not do. We are unable to say what was really meant by the jury in the answer to this question. It may have been in the minds of the jurors that the acts leading up to the injury were intentionally done, without the element of wilfulness, or they may have thought that the injury was caused by wilfulness. From any viewpoint, the question is objectionable. So that we conclude that interrogatory No. 38, and the answer thereto, shall not be considered in determining the question as to whether there is a conflict between the general verdict and the answers to interrogatories. This being the only question presented in support of this motion, we find no error was committed by the trial court in this respect.

The next question presented and argued is the alleged error of the court in overruling the motion for judgment on the pleadings, notwith-

5. standing the general verdict. Section 592 Burns 1914, §566 R. S. 1881, provides: "When upon the statements in the pleadings, one party is by law entitled to judgment in his favor, judgment shall be rendered by the court, though a verdict has been found against such party." Inasmuch as we hold the fourth paragraph of complaint good as against a demurrer, this motion was properly overruled. Demurrers to the third and fourth paragraphs of complaint were overruled, and proper exceptions were reserved thereto. For reasons above stated, the ruling of the court on the demurrer to the third paragraph of complaint need not be considered, as there was a finding for appellant upon said paragraph. *Winnemucca Water, etc., Co. v. Model Gas, etc., Works* (1913), 179 Ind.

542, 549, 101 N. E. 1007. Appellant does not

6. point out in argument any special objection to the fourth paragraph of complaint. We

have examined it with care. The substance is set out herein, and it is our conclusion that said paragraph states facts constituting a cause of action.

The next error presented and argued is the alleged error of the court in overruling appellant's motion for a new trial, in support of which it

7. is insisted first, that the court erred in permitting questions Nos. 65, 66 and 67 of the deposition of the witness Carboy, and each one of them, to be read in evidence. These questions and answers thereto develop the fact that the railroad track at the point where decedent was killed had been used for a number of years as a thoroughfare by the students of the university. While the fact that other people were in the habit of using appellant's track as a thoroughfare would not excuse decedent for his negligence, which proximately contributed to his injury, prejudicial error can not be predicated upon such evidence in this case, as decedent's want of due care is conceded on the theory upon which the case was tried.

It is next insisted that there was error in admitting the evidence of May Bradberry that no warning was given them not to go on the track at

8 Greenwich Street crossing. We think no error can be predicated on the admission of this evidence, for the reason that under the fourth paragraph of the complaint it becomes important to know in determining the issues presented, whether decedent had actual knowledge of the immediate danger which resulted in his death. As we view this paragraph of the complaint it is based upon the doctrine of last clear chance. If decedent had actual knowledge of his immediate danger, and voluntarily encountered the risk, then he was guilty of such contributory negligence as will prevent a recovery. It, therefore, became important in the evi-

dence to have the jury know the facts in order that it might determine that question. If, as is claimed, decedent was unconscious of his danger, and appellant's servants knew the danger, then, if the other facts disclosed warrant it, the doctrine of last clear chance is presented. *Indianapolis Traction, etc., Co. v. Croly* (1913), 54 Ind. App. 566, 96 N. E. 973, 98 N. E. 1091.

It is further insisted that there could be no recovery because decedent was under no legal obligation to contribute to the support of his

9. father and mother, brothers and sisters, and that evidence heard in support of this theory was improper. It need not be shown, and the fact need not exist, that decedent was under a legal obligation to contribute to the support of his next of kin in order to warrant a recovery in this action. It is the settled law that a recovery in such cases must be based on the theory that the next of kin has sustained a pecuniary loss. That pecuniary loss is based wholly upon the fact that decedent had contributed to their support for reasons which were sufficient for himself and next of kin, and that they had reasonable expectation that such contributions would continue. This being true, all the facts

and circumstances surrounding the parties, 10. together with the facts showing the ability and probable inclination of decedent to so continue such contributions, were proper to be heard in evidence. *Pittsburgh, etc., R. Co. v. Reed* (1909), 44 Ind. App. 635, 642, 644, 88 N. E. 1080; *Diebold v. Sharp* (1898), 19 Ind. App. 474, 49 N. E. 837; *Louisville, etc., R. Co. v. Wright* (1893), 134 Ind. 509, 34 N. E. 314.

Objections are made to the refusal of the court to submit certain interrogatories to the jury. We have examined with some care the interrogatories

refused by the court, and do not find that

11. reversible error was committed. The interrogatories submitted were elaborate and searching, and develop the essential facts at issue in the cause. The interrogatories refused go wholly to the question of decedent's want of due care. The interrogatories find, in substance, that decedent was killed by being struck by a locomotive engine at the time and place set out in the complaint; that he, in company with a young lady, was walking upon the railroad track for pleasure; that at least one of appellant's trains passed along the track each hour. The company's railroad was at said point double tracked; that Greenwich Street, at which point decedent entered thereon, crossed both tracks, which were straight for a distance of ninety rods east and west of the crossing; that they walked toward the east, and noticed a train approaching from that direction on the north track, upon which they were walking. They crossed from the north to the south track in order to avoid the approaching train; that they were not excited or flustered by the approach of the train from the east; that they walked some distance up the track toward the east, with their faces in that direction, decedent supporting the young lady upon the rail; that the train approached from the west. If he had looked west at the time he entered upon the south track, he could have seen the train approaching from the west; that he was a strong and active man; that the engine which struck him was some distance away from him when he went upon the south track, running at the rate of thirty miles per hour at that time; that the distance from the middle line of Greenwich Street to the middle of the cattle guard over which decedent and the young lady passed was 254.4 feet; that there was no road, street or highway at the point where decedent



was struck, and that the engine was operated by John Bechtol, engineer, in the employ of appellant at the time; that John Bechtol, as such engineer, wilfully or intentionally ran said engine upon and caused it to strike decedent; that the engineer, after he realized that decedent was probably unconscious of his peril, did not do all in his power to stop the engine, and avert striking him; that the point where decedent was struck was not within the limits of any depot grounds, road, street or highway, and if decedent had listened for a train upon the south track which might be approaching him from the west, he could not have heard the train that struck and killed him. The findings of the jury cover all the elements in the case, as well as all the essential facts covered by the interrogatories refused.

It is argued that instruction No. 3 given by the court at appellee's request is erroneous. Said instruction reads as follows: "The court

12. instructs the jury that the decedent, A. F.

Reesor was a trespasser upon defendant's track at the time and place complained of by the plaintiff and the jury in this case will find for the defendant, unless they further believe from a preponderance of the evidence that the defendant's engineer in charge of its east bound train No. 2 at the time and place complained of discovered that said decedent, A. F. Reesor, was in a perilous position on defendant's track in front of said train and that the decedent, Reesor, was unaware of his perilous position and that he made said discovery in time to avoid striking said Reesor by stopping said train or checking the speed thereof by the exercise of ordinary care in the use of the means then at hand and under the control of said engineer consistent with the safety of said train and the passengers thereon. But in case you find that said en-

gineer with ordinary care in the use of such means as were then at hand and under his control and without endangering the train or the persons thereon could have stopped said train or checked the speed thereof so as to avoid striking said decedent, then your verdict should be for the plaintiff." It is contended that this instruction omits entirely the question of negligence, and a definition of ordinary care, and, therefore, it follows that the jury was misled, and was peremptorily directed to find for appellee, if appellant's servants, in the exercise of ordinary care could have avoided the injury. Instruction No. 7 given by the court fully explains the care required of the engineer. It is further urged in objection to this instruction that it gave the jury to understand that decedent was not obliged to use ordinary care with which he is always chargeable in case of injury.

As a general proposition, the statement of

13. the law contended for by appellant is correct, but in the application of the doctrine of last clear chance, the existence of the negligence of
12. the party injured, or his failure to exercise due care will not, in all cases, defeat a recovery. Although he failed to exercise due care, which continued up to the moment of his injury, if the evidence discloses that the engineer in charge of this train, applying the principle to this case, realized the danger of decedent, and knew that he was unconscious of his danger, and so knowing and realizing failed to exercise ordinary care to avoid the injury, appellee is entitled to recover. This instruction was drawn upon that theory, and is, therefore, not erroneous. *Indianapolis Traction, etc., Co. v. Croly, supra; Chicago, etc., R. Co. v. Pritchard* (1907), 168 Ind. 398, 79 N. E. 508, 81 N. E. 78, 9 L. R. A. (N. S.) 857; *Indianapolis Traction, etc., Co. v. Kidd* (1906), 167 Ind. 402, 79 N. E.

347, 7 L. R. A. (N. S.) 143, 10 Ann. Cas. 942.

Instruction No. 7 reads as follows: "While it is true, as a general rule, that an engineer of a locomotive engine, seeing a man of adult years on the track in front of his train, has the right to presume that such man will leave the track in time to avoid collision with his train, and to indulge this presumption until the last moment that general rule has its exception; and the presumption that the man will leave the track in time to avoid injury, may not be indulged by the engineer, under the law of this state, if from the situation as it presents itself to said engineer or as it would present itself to a man of ordinary prudence and judgment in the engineer's exact situation it is apparent that the man on the track is unconscious of his peril and in all cases where the man on the track is in a perilous situation, and unaware of his peril, and a man of ordinary prudence situated as such engineer is at the time situated, would see and know such facts, it then becomes the duty of such engineer to abandon such presumption and use all the means at hand and under his control, which may be used with safety to his train and the persons thereon, to avoid injuring the man on the track; and such engineer is not, under the circumstances last indicated in this instruction, authorized to presume that the man on the track will leave the track; but, from the time he discovers the man's perilous position, his unconsciousness of danger, the engineer must presume that the man will not leave the track until the danger of his position or his unconsciousness of such danger ceases." It is insisted that this instruction is erroneous for the reason that it imposes a duty upon the engineer not contemplated by the law. For instance, appellant insists that it charges that the engineer's failure to use ordinary care to discover de-

cedent on the track in the first instance, would render appellant liable under the doctrine of last clear chance, in spite of appellee's prior and continuing negligence. If this is the theory of the instruction, the objection is well taken. While this instruction is not a model, we think it is not susceptible of the construction given it by appellant's learned counsel. When the tenor and full import of the language is considered, it is fairly stated as the dominant thought that this engineer, if he actually saw decedent upon the track, and after so seeing him, if he realized decedent's perilous situation, and that decedent was unconscious of his danger, or if by the exercise of due care he could have known of said decedent's peril, and his unconsciousness thereof, then, in that situation, he could not indulge the presumption that decedent would leave the track in time to avoid injury, but he, the engineer, must use all the means at hand and under his control to avoid the injury. Whether he did use such means was a question of fact for the jury. Appellant states the rule too broadly in its criticism. The rule as laid

15. down by our courts as applied to the present case, may be stated as follows: If the engineman actually saw appellee on the track, and realized or should have realized his peril by the exercise of ordinary care, then said engineman was charged with ordinary care to discover whether he was conscious of his danger, and to use all the means at hand and under his control to avoid the injury. If he failed to exercise ordinary care under such circumstances, and in the particulars stated, then his negligence became the proximate cause of the injury, and the want of due care of the injured party became the remote cause. This is the rule laid down in the case of *Indianapolis Traction, etc., Co. v. Croly, supra*. The case of *Indianapolis Traction,*

*etc.*, *Co. v. Kidd, supra*, fully sustains this instruction as given, using language very similar. It is practically undisputed that the engineer saw decedent and knew his perilous situation. Whether he exercised due care under all the circumstances was a question of fact. We think the jury can not have been misled by this instruction, and, therefore, it was not error to give it.

It is further insisted that the giving of instruction No. 8 requested by appellee was erroneous.

This instruction was upon the theory of wilful injury as charged in the third paragraph of complaint. Inasmuch as there was a finding for appellant upon said third paragraph, no error can be predicated upon the giving of this instruction. *Partenheimer v. Southern R. Co.* (1913), 54 Ind. App. 125, 101 N. E. 103; *Southern R. Co. v. Ellis* (1913), 53 Ind. App. 34, 101 N. E. 105; *Louisville, etc., Traction Co. v. Lottich* (1915), 59 Ind. App. 426, 106 N. E. 903. The same may be said to be true with respect to instructions Nos. 9 and 12 requested by appellee, and given by the court.

Error is also predicated upon the refusal of the court to give instructions Nos. 2, 3, 5, 8, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 24, 27, 30, 33, 34

17. and 36 requested by appellant. Instructions Nos. 15, 16, 17, 18 and 19 inform the jury as to the law with respect to wilfulness. Inasmuch as this issue was decided in favor of appellant, as heretofore stated, no error can be predicated on the failure to give these instructions. We have examined all of the other instructions, and in so far as they were applicable to the issue, they were covered by the instructions given. The other instructions, while stating the law correctly generally, ignore entirely the theory of last clear chance. We think no error can be predicated upon the refusal to give any

of the instructions so tendered. *Boland v. Claudel* (1914), 181 Ind. 295, 104 N. E. 577.

The evidence discloses that decedent was a young man attending law school at Valparaiso, Indiana, and on the evening of July 27, 18. 1908, in company with a young lady, a fellow student, he entered upon the tracks of appellant at a public crossing and walked down the track for a pleasure stroll. They were walking toward the east. The railroad at that point was double tracked, and they were walking on the north track. A train was approaching from the east upon the north track. They crossed over to the south track and continued their walk. It is disclosed that a train was approaching also from the west, on the south track, toward which decedent's back was turned. There is evidence to sustain the theory that the noise of the train approaching from the east prevented decedent from hearing whatever signals were given by the train approaching from the west. There is some evidence to show, also, that the proper signals were not given. There is evidence to show that the engineer knew decedent was unconscious of his danger, because of his actions and conduct, and because of the engineer's knowledge that the train passing decedent was making such noise as to prevent him hearing the signals given by the train approaching from the west. The evidence of the young lady who accompanied him is to the effect that neither of them knew anything of the train approaching from the west until said train was within twenty feet of them, too late for decedent to escape injury. There was therefore evidence upon which the jury might rest a verdict, and upon which this court should sustain it on the doctrine of last clear chance, as this court can not weigh the evidence to disturb the verdict of the lower court. There is evi-

dence to sustain the verdict in this court under the well settled rule. It follows, therefore, that no error was committed in overruling appellant's motion for a new trial, neither was there error in overruling appellant's motion in arrest of judgment. We find no error in the record which would warrant this court in reversing the judgment. Judgment affirmed.

NOTE.—Reported in 108 N. E. 983. As to who may sue for death by wrongful act, see 12 Am. St. 870. As to the doctrine of last clear chance as affected by the question whether negligence of plaintiff or decedent and of defendant was concurrent, see 7 L. R. A. (N. S.) 132, 152; 17 L. R. A. (N. S.) 707; 19 L. R. A. (N. S.) 446; 27 L. R. A. (N. S.) 379. On the last moment to which a presumption that a person in a dangerous condition will seek a place of safety may be indulged, see 69 L. R. A. 554. See, also, under (1) 38 Cyc 1885, 1887; (2) 29 Cyc 658; (3) 38 Cyc 1912; (4) 38 Cyc 1930; (5) 23 Cyc 779; 31 Cyc 608; (6) 33 Cyc 865-869; (7) 38 Cyc 1425; (8) 33 Cyc 888; (9) 13 Cyc 321; (10) 13 Cyc 350, 354, 355; (11) 38 Cyc 1913; (12) 33 Cyc 915; (13) 29 Cyc 530; (14) 33 Cyc 910; (15) 33 Cyc 854; (16) 38 Cyc 1815; (17) 38 Cyc 1711, 1817; (18) 33 Cyc 889, 892.

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### ADOLAY v. MILLER ET AL.

[No. 8,906. Filed February 2, 1916.]

1. PHYSICIANS AND SURGEONS.—*Care and Skill Required.—General Rule.*—In the absence of a special agreement a physician or surgeon is deemed to impliedly contract that he possesses the reasonable and ordinary qualifications of his profession and that he will at least exercise reasonable skill, diligence and care, but a promise to effect a cure will not be implied. p. 659.
2. PHYSICIANS AND SURGEONS.—*Care and Skill Required.*—In determining whether a physician or surgeon has exercised the degree of care and skill which the law requires, regard must be had to the advanced state of the profession at the time and in the locality in which he practices. p. 660.
3. PHYSICIANS AND SURGEONS.—*Care and Skill Required.—Specialists.*—A physician or surgeon employed as a specialist is bound to use the degree of skill and knowledge which is ordinarily possessed by physicians who devote special attention and study to the disease, its diagnosis and treatment, having regard to the present state of scientific knowledge. p. 660.



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4. PHYSICIANS AND SURGEONS.—*Malpractice.—Evidence.*—In an action for malpractice in the treatment of a fractured arm, evidence merely showing the acts of defendants as the same were observed by plaintiff and his wife, and that defendants stated that in their belief the arm would be restored to its usefulness, while in fact it was not thus restored, was not sufficient to make a case for plaintiff, since there was no evidence to give the jury a standard by which to determine whether there was a neglect of duty on the part of defendants. p. 661.

From Superior Court of Marion County (90,-514); *Charles J. Orbison*, Judge.

Action by Fred W. Adolay against Albert W. Miller and John Kolmer. From a judgment for defendants, the plaintiff appeals. *Affirmed.*

*Frank S. Roby, Ward H. Watson, Sol H. Esarey and E. D. Salsbury*, for appellant.

*Solon J. Carter and D. P. Williams*, for appellees.

IBACH, C. J.—Appellant suffered a compound fracture of the bones of the right forearm and appellees, physicians and surgeons, were employed to reduce the fracture. In this suit appellant seeks to recover damages which he claims he has suffered in consequence of appellees' failure to exercise a reasonable degree of care and skill in their treatment of him. The record discloses that after the complaint was filed and before the filing of the separate answers by each defendant, separate motions to require plaintiff to make his complaint more definite and certain were overruled. At the close of plaintiff's evidence, the trial court sustained defendants' motion for a peremptory instruction in their favor, a verdict was returned accordingly and judgment for defendants entered thereon. The correctness of this action of the trial court is the only question presented for our consideration. Or, as appellant, has expressed it, the question is "whether an inference of

negligence against appellees or either of them because of omissions or commissions might have been drawn by the jury from the facts before it.”

The only evidence produced at the trial was that introduced by appellant, and consists of the testimony of himself and his wife and two skiagraphs of the injured arm taken several weeks after the accident by another physician and surgeon. A narrative statement of the testimony, portions of which we have taken from the briefs, is as follows: Appellant was injured by being run over by a wagon, was carried into a house close by. Doctor Miller was called; he, together with other persons, extended and pulled on the arm using “a whole lot of force”. “After they got it together they bandaged it up.” The doctor then stated it was all right. The splints used by him were made from pieces of a soap box, padded with cotton, one of them was placed on the front of the arm, the other on the back thereof, and then bandages were wrapped around the splints. Appellant was then moved to his home, his arm continued to hurt but “there was no swelling”. He called Doctor Miller again, the same day, because of his suffering, and he informed appellant he could not do more, “he would have to stand his suffering”. At the request of both appellant and his wife, Doctor Miller brought a specialist, Doctor Kolmer, who after examining his body generally, moved the fingers of the injured man up and down and said, “the fingers are all right and the arm is set all right”. This visit was on Friday, the same day of the injury. The Tuesday following Doctor Kolmer came again with Doctor Miller, they removed the bandages and splints, extended the arm, manipulated the fractured bones and reset the arm. They worked on it fifteen minutes, Miller at the elbow and Kolmer at the hand and they pulled it and

manipulated it, using "a lot of force," and after they "had it right they applied the splints and bandaged it up". Kolmer said it would be all right. Appellant wanted an "X-ray put on the arm". Kolmer said it was unnecessary. Kolmer did not visit appellant after this time, neither did he see the arm again until after the bandages and splints were removed, about twelve or thirteen weeks thereafter. Doctor Miller, however, saw him every day during the first two weeks, the second day after the doctors reset the arm, Miller removed the dressings and bandages, rubbed the arm with alcohol, replaced the splints and bandages, and continued such treatment every second day thereafter. For a period of three weeks appellant was confined to his bed because of injuries to his back and side. After he left his bed, he visited Doctor Miller in his office from time to time for ten or eleven weeks. About thirteen weeks after the accident Doctor Miller finally removed the splints and bandages. A short time before the splints were finally removed, appellant, while at Doctor Miller's office, and while he was treating him by holding his arm, rubbing it with alcohol and with the back of the hand turned up, appellant first noted a lump on his arm, and the doctor said the arm would straighten. When the splints were finally removed, appellant went to Doctor Kolmer's office and he examined the arm and he informed him that the arm could be straightened by having an operation performed.

When a physician and surgeon assumes to treat and care for a patient, in the absence of a special agreement, he is held in law to have impliedly

1. contracted that he possesses the reasonable and ordinary qualifications of his profession and that he will exercise at least reasonable skill, diligence and care in his treatment of him. This

implied contract on the part of the physician does not include a promise to effect a cure, and negligence can not be imputed because a cure is not effected, but he does impliedly promise that he will use due diligence and ordinary skill in his treatment of the patient so that a cure may follow such care and skill, and this degree of care and skill is required of him, not only in performing an operation, or administering first treatments, but he is held to the like degree of care and skill in the necessary subsequent treatments, unless he is excused from further service by the patient himself, or the physician or surgeon upon due notice refuses to treat the case further.

In determining whether the physician or

2. surgeon has exercised the degree of care and skill which the law requires, regard must be had to the advanced state of the profession at the time of treatment and in the locality in which the physician or surgeon practices. But

where a physician or surgeon is employed as a

3. specialist on account of his peculiar learning and skill, he "was bound to bring to the discharge of his duty to patients employing him as such specialist, the degree of skill and knowledge which is ordinarily possessed by physicians who devote special attention and study to the disease, its diagnosis, and treatment, having regard to the present state of scientific knowledge." *Baker v. Hancock* (1902), 29 Ind. App. 456, 461, 63 N. E. 323, 64 N. E. 38. In either case, the legal duty of the general practitioner of medicine and surgery and the legal duty of the specialist must be measured by some legal standard. It must be tested by some competent evidence so that the jury may have before it a proper standard by which it may determine, whether the acts done by or the omissions of the

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physician or surgeon constitute a neglect or omission of duty.

With these propositions of law before us, can it be said there is any evidence in the case from which two inferences might be reasonably drawn, either that there was a neglect of duty, or there was

4. not? If such evidence does not appear, the question of the sufficiency of the evidence was one of law for the court and not a question of fact for the jury. The evidence in this case, to our minds, shows nothing more than the acts of the appellees while engaged in setting the injured bones of appellant's arm as the same were observed by appellant and his wife, the nature of the treatment by Doctor Miller thereafter as they observed it, the statement of appellees as to their belief that the arm would be restored to its usefulness and the fact that the arm was not straight when the splints were removed. There is no evidence from any physician who has given the jury any standard by which the fact in dispute could be properly determined, and since the jury is not permitted to draw the conclusion of unskilfulness from the result of the operation or treatment it seems to us to permit the jury to determine the case without some competent evidence as a standard from which it might be determined whether the services rendered by appellees were done with reasonable care and skilfulness would be to permit a determination of that question from mere speculation and conjecture. *McGraw v. Kerr* (1912), 23 Colo. App. 163, 128 Pac. 870; *Longfellow v. Vernon* (1915), 57 Ind. App. 611, 105 N. E. 178; *Jackson v. Burnham* (1895), 20 Colo. 532, 39 Pac. 577; *Sawyer v. Berthold* (1912), 116 Minn. 441, 134 N. W. 120. Judgment affirmed.

NOTE.—Reported in 111 N. E. 313. As to amount of care required of a physician or surgeon, see 93 Am. St. 657. On the degree of care

and skill required of a physician, see 37 L. R. A. 830; 1 Ann. Cas. 21, 306; 14 Ann. Cas. 605, for that required of a specialist, see 20 L. R. A. (N. S.) 1030; Ann. Cas. 1915 D 1124. As to the proof necessary to discharge burden of showing that the negligence or unskillfulness of the physician caused or contributed to the death or injury of the patient, see 15 L. R. A. (N. S.) 416. On the liability of physician or surgeon for failure to follow established practice as to methods of treatment, see L. R. A. 1915 C 595. See, also, under (1) 30 Cyc 1570, 1573; (2) 30 Cyc 1572; (3) 30 Cyc 1571; (4) 30 Cyc 1587.

### THE J. F. DARMODY COMPANY v. REED.

[No. 8,940. Filed February 2, 1916.]

1. NEGLIGENCE.—*Collision on Streets.—Action.—Evidence.—Sufficiency.*—In an action for damages for injuries received by an infant six years old who was run down by defendant's motor car while he was on that portion of the sidewalk composing a private driveway, evidence showing that the driver saw the child in company with its uncle approaching the driveway, and disclosing the method in which the motor car approached, and that neither the child nor its uncle saw the motor car until it struck them, was sufficient to warrant the submission of the question of negligence to the jury, and its verdict for plaintiff can not be disturbed on appeal. pp. 665, 666.
2. APPEAL.—*Review.—Evidence.—Weight.*—The court on appeal will not weigh the evidence for the purpose of determining upon which side of a case the greater weight lies. p. 666.
3. NEGLIGENCE.—*Infants.—Contributory Negligence.—Review.*—Where the injured person was an infant who had not reached the age of accountability, the court on appeal will not consider the question of whether the child was guilty of contributory negligence, since such a child is *non sui juris*. p. 666.
4. NEGLIGENCE.—*Automobiles.—Duty of Driver.*—One driving a motor car from the street onto a private driveway across a sidewalk is charged with the duty to use the precautions which the circumstances require to inform persons on the sidewalk of his approach. p. 666.
5. DAMAGES.—*Personal Injuries.—Excessive Damages.*—A verdict for \$600 for injuries to a six-year-old boy who was struck by an automobile was not excessive in view of evidence showing that the collision rendered him unconscious and resulted in a severe shock to his nervous system and caused his eyes to become crossed. p. 667.
6. APPEAL.—*Review.—Refusal of Instructions.*—Where the court gave an instruction in lieu of and which fully covered a requested instruction upon the subject of plaintiff's burden to prove the ma-

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- terial allegations of the complaint by a preponderance of the evidence, there was no error, although the instruction given had coupled with it a definition of preponderance of evidence, and a statement as to where the burden lies. p. 668.
7. NEGLIGENCE.—*Action.—Instructions.*—“*Non Sui Juris*”.—An instruction in an action for personal injuries to a child six years of age, giving the essential definition of “*non sui juris*” in which accountability and appreciation of danger were clearly defined, was not defective for failure to use the technical words “*non sui juris*”. p. 668.
8. APPEAL.—*Review.—Refusal of Instructions.*—The refusal of requested instructions was not error where they were fully covered by instructions given. p. 668.
9. NEGLIGENCE.—*Imputed Negligence.—Contributory Negligence.*—Where an infant six years of age was walking on the sidewalk accompanied by his uncle, negligence of the latter could not be imputed to the infant so as to render him guilty of contributory negligence. p. 669.
10. NEGLIGENCE.—*Collision on Street.—Injury to Infant.—Trial.—Argument.*—Where an infant *non sui juris*, when struck by a motor car, was proceeding over a private driveway across a sidewalk, accompanied by his uncle, and the court fully instructed the jury as to the degree of care required of defendant under such circumstances, the contention that since the child was so accompanied the same degree of care was not required of defendant as would have been required if he were not so accompanied was a matter for argument to the jury rather than for an instruction by the court. p. 669.
11. EVIDENCE.—*Hearsay.—Admissibility.*—The voluntary statement of a physician who examined an injured person, made while the latter was unconscious, is inadmissible as being purely hearsay. p. 670.

From Superior Court of Marion County (90,-347); *Clarence E. Weir*, Judge.

Action by Freddie Reed, by his next friend James F. Calvin, against The J. F. Darmody Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

*James Bingham*, for appellant.

*Alvah J. Rucker* and *James E. Roca*, for appellee.

SHEA, J.—This was an action to recover damages for personal injuries sustained by appellee by reason of appellant's alleged negligence in running



one of its automobiles against him. The allegations of the complaint show in substance that appellant is a corporation engaged in operating delivery automobiles in the city of Indianapolis, Indiana, in connection with its confectionery business; that on March 20, 1913, appellee was *non sui juris*, and is now an infant about six years old, bringing this action by his next friend, James F. Calvin; that on said date appellee, in company with said Calvin, was walking on West Michigan Street in the city of Indianapolis, upon a public sidewalk, and across a driveway leading into a grocery store, which was a part of the sidewalk, that at said time and place appellant, by its agents and servants, negligently propelled one of its automobiles upon and against appellee, whereby he was thrown to the ground and seriously injured. Appellant answered the complaint in general denial. There was a trial by jury, and verdict and judgment in favor of appellee for \$600. The only error relied on for a reversal is the overruling of appellant's motion for a new trial, in support of which it is assigned and argued that the verdict of the jury is not sustained by sufficient evidence, and is contrary to law.

The evidence discloses that appellee was six years old and lived with his uncle, James F. Calvin, who was with him at the time of the accident, at 2611 West Michigan Street; that Calvin had taken the boy to a barber shop, a distance of about seventy feet from his house, on the same side of the street, and was returning home; that the accident occurred about ten o'clock in the morning, and about fifty feet from appellee's home; that there is a private driveway between the house and barber shop running north and south, which crossed the sidewalk of Michigan Street on which Calvin and appellee were walking, and was a part of same.

From the street to the driveway proper there was a slight elevation of about ten inches, slanting from the street upwards to within about five feet of the property line, from which point it was practically level with the property line. Appellant's automobile, a covered delivery machine, was going west on Michigan Street, and turned south to get across the driveway. Appellee and his uncle were slowly walking west toward the driveway, in the same direction the auto was going, the boy being nearest the property line. Calvin testifies that he and appellee had hardly stepped off the sidewalk onto the driveway when the accident occurred; that they started to make the step at the same time, but as he was taller, appellee pitched forward a little, probably a foot ahead of him and the fender of appellant's automobile struck appellee and knocked him down; the front wheel ran over his right foot; that he jerked appellee out before the back wheels struck him, but he hit his head and shoulders on the concrete driveway; that no horn or whistle was sounded and the machine came upon them at great speed from the rear; that the fender hit Calvin across the arm; that there was a step down from the level of the sidewalk onto the driveway within a foot of the property line of about six to seven inches.

It is argued in support of appellant's contention that "the evidence shows that appellee and witness,

Calvin, deliberately walked into appellant's

1. automobile as they walked westward", thus causing the injury complained of; that they had good eyesight and hearing, and there was nothing to obstruct the view. It must be remembered that appellee and Calvin were walking in the same direction the automobile was traveling, and that it approached them from the rear; that the movement

of the automobile was much more rapid than the movements of the parties; that the fact that they did not see the automobile until it struck them is undisputed. There is a dispute as to whether appellant's servants sounded the horn, or made any effort to notify appellee of the approach of the auto, although the driver of the car saw appellee and his foster father approaching the driveway and very near it. The question of appellant's negligence, as well as the negligence of appellee, was submitted to the jury. This court will not weigh the evi-

2. dence for the purpose of determining upon which side the greater weight lies in any case. Under the circumstances of this case, we

3. need not consider the question as to whether appellee was guilty of negligence which contributed to his injury. He was an infant less than six years of age, and the jury by its verdict finds that he had not reached the age of accountability. In the eyes of the law he was *non sui juris*. The evidence

shows he was walking along the street in the

4. direction of his home, at a place where he had a perfect right to be, and if he was gazing in at a shop window, as the driver of the machine states, then it was the driver's duty to use the precautions which the circumstances required to inform appellee of his approach. It was at least his duty to sound the horn, which the general verdict of the jury finds he did not do. He was required to use this care regardless of the age of appellee. It must

be taken into account that the use of this

1. crossing was confined to persons who had business with the occupants of adjoining premises, most of the witnesses calling it a private driveway, which fact must be considered in determining the degree of care required of appellant. We can not say under these circumstances that the ver-

dict is contrary to law. *Saylor v. Union Traction Co.* (1907), 40 Ind. App. 381, 81 N. E. 94; *Louisville, etc., R. Co. v. Sears* (1894), 11 Ind. App. 654, 38 N. E. 837; *Hammond, etc., St. R. Co. v. Blockie* (1907), 40 Ind. App. 497, 82 N. E. 541; *Elwood, etc., R. Co. v. Ross* (1901), 26 Ind. App. 258, 265, 58 N. E. 535.

It is next urged that the damages assessed by the jury are excessive. There is much evidence as to the physical condition of appellee both before and after the accident. It is very strenuously argued that there was no injury of a permanent character, or even of a serious nature; that the immediate ill effects were due to fright rather than physical injury. The amount of the recovery is \$600. There is evidence that appellee was struck by the automobile and knocked down on the concrete pavement, and rendered unconscious; that he remained in a semi-conscious condition until the next day; that his leg and foot were injured; that his eyes, which before the accident had been in fair condition, were now crossed; that his nervous system was severely shocked and that there was a change in his temperament subsequent to the accident. Under such circumstances we can not say that the verdict of the jury was the result of corruption, passion or prejudice, and, therefore, can not say that the damages assessed are excessive. *Joseph E. Lay Co. v. Mendenhall* (1913), 54 Ind. App. 342, 102 N. E. 974; *Indianapolis Traction, etc., Co. v. Beckman* (1907), 40 Ind. App. 100, 81 N. E. 82; *Oolitic Stone Co. v. Ridge* (1910), 174 Ind. 558, 582, 91 N. E. 944; *Terre Haute, etc., Traction Co. v. Maberry* (1913), 52 Ind. App. 114, 100 N. E. 401.

Appellant also insists that the court erred in giving and refusing to give certain instructions. We will consider the instructions given and

refused, to which objection is made, in their  
6. order. It is argued that instruction No. 1 requested by appellant and refused by the court should have been given. This instruction reads as follows: "The burden is upon the plaintiff to prove the material allegations of this complaint by a preponderance of all the evidence in the case, and unless you find that each and all such allegations are so proven, your verdict should be for the defendant." Instruction No. 2 given by the court on its own motion contains this language: "The burden is upon the plaintiff to establish all the material allegations of his complaint by a preponderance of the evidence". Then follows a definition of preponderance of the evidence. No error can be predicated upon the refusal to give the instruction tendered, as the language of the latter instruction covered the essential ground. It was not harmful to couple with it a definition of preponderance of evidence, and a statement as to where the burden lies.

No error was committed in refusing to give appellant's tendered instruction No. 2, because the essential definition of *non sui juris* is given  
7. in the court's instructions Nos. 5 and 6. While the technical words "*non sui juris*" are not used, accountability and appreciation of danger are clearly given, which is sufficient in view of the facts of this case. No error was committed in refusing to give appellant's instruction No. 3 as it was covered by the court's instruction No. 5. Appellant's instruction No. 4 tendered and refused by the court reads as follows: "You are the judges of whether plaintiff did know and appreciate the danger of being struck or run over by defendant's automobile and the burden is upon the plaintiff to prove by a preponderance of the evidence bearing upon that question that plaintiff

did not know and appreciate such danger, and unless you find that plaintiff has so proven that plaintiff did not know and appreciate such danger, then you should find that the plaintiff was *sui juris*, and did know and appreciate said danger." The degree of accountability is covered by the court's instruction No. 5. In the court's instruction No. 6 the jury is told that if plaintiff knew and appreciated the danger of being run over, and that he was also guilty of negligence which contributed to his injury, he could not recover, even though the defendant was guilty of negligence, so that the essential elements of defendant's instruction No. 4 were given, and no error was committed in refusing it. Appellant's instructions Nos. 8, 9 and 10, in so far as they are applicable to the present case, are fully covered by the court's instructions Nos. 10, 11 and 12. We do not find from the evidence that such emergency arose as to require the giving of appellant's instruction No. 11, therefore, no error was committed in refusing it.

The jury was correctly instructed in the court's instructions Nos. 8, 9, 10, 11 and 12 on the 9. questions involved. The court's instruction No. 14 reads as follows: "I instruct you that should you find that Mr. Calvin in 10. whose charge the plaintiff was at the time of the injury in question was himself negligent that such negligence of Mr. Calvin cannot be imputed nor charged to or against the plaintiff." It is argued in this connection that since appellee was accompanied by his foster father, the same degree of care was not required on the part of appellant as would have been required if he were not so accompanied. The jury was fully instructed in instructions Nos. 8 and 9 given by the court on its own motion as to the degree of care required of appellant un-

der the same or similar circumstances, so that the fact that appellee was accompanied by his foster father was a question of argument to the jury rather than for an instruction by the court. *City of Evansville v. Senhenn* (1898), 151 Ind. 42, 47 N.E. 634, 51 N. E. 88, 68 Am. St. 218, 41 L. R. A. 728; *Henry v. Epstein* (1913), 53 Ind. App. 265, 101 N. E. 647; *City of Jeffersonville v. McHenry* (1899), 22 Ind. App. 10, 53 N. E. 183; *McNamara v. Beck* (1899), 21 Ind. App. 483, 52 N. E. 707; *Indianapolis St. R. Co. v. Bordenchecker* (1904), 33 Ind. App. 138, 70 N. E. 995. No error was committed in the giving of said instruction.

There is a complaint as to the introduction and refusal to admit evidence. We find no error of the court in its rulings on the admission and refusal to admit certain evidence of James F. Calvin set out in the brief.

The court refused to permit Leo Meyers to answer a question directed to him as to what was said by the physician who examined appellee 11. after the injury. The evidence refused does not purport to be a conversation between the physician and appellee such as may be admitted under the holding of the Supreme Court in the case of *Springer v. Byram* (1894), 137 Ind. 15, 36 N. E. 361, 45 Am. St. 159, 23 L. R. A. 244, and *Indiana Union Traction Co. v. Thomas* (1909), 44 Ind. App. 468, 475, 88 N. E. 356, but is apparently the voluntary statement of the physician at a time when the patient himself was unconscious. Under such circumstances the evidence was inadmissible as being purely hearsay. It could not be heard on the theory that appellee was bound by the statement, and we are of the opinion that if appellee was perfectly conscious the question of its admission would be addressed to the sound discretion of the trial court, in



view of the age of appellee. No error was committed in the exclusion of this evidence.

We find no error in the record which warrants the court in reversing this judgment. Judgment affirmed. Ibach, C. J., Felt, P. J., Hottel, Moran, Caldwell, JJ., concur.

NOTE.—Reported in 111 N. E. 317. As to imputed negligence in case of small child see 110 Am. St. 281. On excessiveness of verdicts in actions for personal injuries other than death, see L. R. A. 1915 F 30; Ann. Cas. 1913 A 1361. On reciprocal duty of operator of automobile and pedestrian to use due care, see 38 L. R. A. (N. S.) 487; 42 L. R. A. (N. S.) 1178. As to negligence of child running in front of automobile, see 26 L. R. A. (N. S.) 435. On imputing negligence of parent to child, see 17 L. R. A. 79; 1 Ann. Cas. 216; 11 Ann. Cas. 686; Ann. Cas. 1912 D 521. As to contributory negligence of parent or custodian as bar to action by child for negligent injuries, see 21 L. R. A. 76; 18 L. R. A. (N. S.) 320. On duty and negligence of operator of automobile see 1 L. R. A. (N. S.) 223; 33 L. R. A. (N. S.) 403. As to the rights and duties of persons driving automobiles in highways, see 13 Ann. Cas. 463; 21 Ann. Cas. 648; as to contributory negligence of children, see 1 Ann. Cas. 895; 17 Ann. Cas. 353; Ann. Cas. 1913 B 969. See, also, under (1) 29 Cyc 627; (2) 3 Cyc 348; (3) 29 Cyc 537; (4) 28 Cyc 28, 30; (5) 13 Cyc 129; (6) 38 Cyc 1704; (8) 38 Cyc 1711; (9) 29 Cyc 556; (11) 16 Cyc 1192.

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### GOODMAN v. BAUER.

[No. 8,960. Filed February 2, 1916.]

1. APPEAL.—*Record.*—*Evidence.*—*Instructions.*—Where the evidence is not in the record, the instructions will not be held erroneous if they were applicable to any possible state of the evidence under the issues. p. 672.
2. APPEAL.—*Presumptions.*—*Burden to Show Error.*—Every presumption is indulged in favor of the correctness of the rulings of the trial court, and appellant has the burden to show affirmatively by the record the error of which he complains. p. 672.
3. NEGLIGENCE.—*Collision on Streets.*—*Action.*—*Complaint.*—*Last Clear Chance.*—A complaint alleging that defendant was driving an automobile west on the north side of a highway and plaintiff was riding a motorcycle going east on the south side thereof at a speed of about eight miles per hour, that defendant negligently, without giving any warning to plaintiff, turned at a speed of twenty miles per hour to go south on an intersecting highway running

north and south, and negligently ran his automobile upon and over plaintiff and injured him, was sufficient to enable plaintiff to invoke the doctrine of last clear chance. p. 673.

4. APPEAL.—*Review.—Instructions.—Evidence.*—Where the complaint was sufficient to invoke the last clear chance doctrine, and the evidence was not in the record, the court on appeal could not hold an instruction on that doctrine erroneous, though perhaps it was subject to criticism, since the evidence may have clearly established the propositions claimed by appellant to have been omitted from such instruction. p. 673.

From St. Joseph Superior Court; *Fred Woodward*, Judge *Pro Tem*.

Action by Robert Bauer against William Goodman. From a judgment for plaintiff, the defendant appeals. *Affirmed*.

*Fred C. Gabriel* and *Lewis W. Hammond*, for appellant.

*P. C. Fergus*, for appellee.

FELT, P. J.—On a complaint and answer by general denial, appellee recovered a judgment against appellant for damages received by him in a collision between an automobile driven by appellant and a motorcycle driven by appellee. Appellant has assigned as error the overruling of his motion for a new trial. The only ground of such motion discussed in appellant's brief questions the correctness of instructions Nos. 8, 9½, 10 and 10½, given at the request of appellee. No attempt has been made to bring the evidence to this court. In the

1. absence of the evidence, the trial court will not be held to have committed reversible error in the giving of instructions if the instructions complained of would have been applicable to any possible state of the evidence admissible under the issues. In this court, every presumption is
2. indulged in favor of the correctness of the rulings of the trial court and to obtain a reversal of a judgment an appellant must affirmatively

show by the record the error of which he complains. *Rapp v. Kester* (1890), 125 Ind. 79, 82, 25 N. E. 141; *Chestnut v. Southern Ind. R. Co.* (1901), 157 Ind. 508, 515, 62 N. E. 32; *Mankin v. Pennsylvania Co.* (1903), 160 Ind. 447, 454, 67 N. E. 229.

The objection urged to instructions Nos. 8 and 9½ is that they are not applicable to the issues. This objection is not tenable under the foregoing rule for it is apparent that the evidence may have fully warranted the giving of the instructions.

The gist of the complaint is that appellant was driving an automobile west on the north side of a public highway and appellee was riding a

3. motorcycle going east on the south side thereof at a speed of about eight miles per hour; that appellant saw appellee, as they ap-
4. proached each other, or could have seen him had he looked; that appellant negligently, without giving any warning to appellee, turned from the east and west highway at a speed of twenty miles per hour, to go south on an intersecting highway running north and south, and negligently ran his automobile upon and over appellee and injured him. Instruction No. 10½ reads as follows: "I charge you that even if you do find from the evidence that the plaintiff did not use due care and caution in the operation of his motorcycle on the day charged, at the crossing alleged, but his want of due care was not the proximate cause of his injury and that the defendant by the exercise of ordinary care and caution could have stopped his automobile, so as to prevent the injury, and that plaintiff, was injured by defendant in the driving of his car, then I instruct you, your verdict should be for the plaintiff." Appellant contends that this instruction was intended to state the law of the last clear chance

doctrine and that it is erroneous in failing to inform the jury that appellant must have seen appellee in a position of danger from which he was unable to extricate himself and failed to use due care to prevent the injury, or that some appreciable time must have intervened between the time appellant saw appellee and the time the accident occurred, during which time appellant could have taken some precautions to prevent the injury. Appellee contends that the giving of the instruction can not be held to be reversible error under the issues, in the absence of the evidence, and that in any event appellant was not harmed because of the giving of instruction No. 12 which is as follows: "The court instructs the jury that if they find from the evidence that both plaintiff and defendant were negligent up to the moment of the accident, and that such negligence on the part of each caused the accident, then I charge you that the plaintiff cannot recover and your verdict should be for the defendant." The complaint is sufficient to enable appellee to invoke the last clear chance doctrine. *Picken v. Miller* (1915), 59 Ind. App. 115, 108 N. E. 968, and cases cited. Whatever view may be taken of instruction No. 10½, it is apparent that under the issues of the case, the undisputed evidence, or the admission of appellant, may have clearly established the propositions which appellant contends are omitted from the instruction, in which event, independent of the merits of the objections urged, the instruction would not have been erroneous as applied to the issues and facts of the particular case, though it may be subject to criticism as a general or abstract statement of the law. Therefore, on the showing made, in the absence of the evidence, we can not say that the court committed reversible error in giving the instruction. *Indianapolis Traction, etc., Co. v. Croly*

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(1914), 55 Ind. App. 543, 545, 104 N. E. 328; *Indiana Union Traction Co. v. Kraemer* (1913), 55 Ind. App. 190, 195, 102 N. E. 141; *Indianapolis Traction, etc., Co. v. Croly* (1913), 54 Ind. App. 566, 96 N. E. 973, 98 N. E. 1091; *Terre Haute, etc., Traction Co. v. Latham* (1913), 53 Ind. App. 366, 370, 101 N. E. 746; *Hartlage v. Louisville, etc., Lighting Co.* (1913), 180 Ind. 666, 668, 103 N. E. 737. Considering all the instructions and the issues, the case seems to have been fairly tried and a correct result reached. No intervening error has been pointed out which would justify a reversal of the judgment. *City of Logansport v. Jordan* (1908), 171 Ind. 121, 134, 85 N. E. 959; *Germania Fire Ins. Co. v. Pitcher* (1903), 160 Ind. 392, 406, 64 N. E. 921, 66 N. E. 1003; *Griffith v. Felts* (1913), 52 Ind. App. 268, 99 N. E. 432; and cases cited; *Friebe v. Elder* (1914), 181 Ind. 597, 609, 105 N. E. 151. Judgment affirmed.

NOTE.—Reported in 111 N. E. 315. As to use of highway by automobile, see 108 Am. St. 213. As to the application of doctrine of last clear chance where danger is not actually discovered, see 55 L. R. A. 418; 36 L. R. A. (N. S.) 957. As to the doctrine of last clear chance as affected by question whether the negligence of plaintiff or decedent and of defendant was concurrent, see 7 L. R. A. (N. S.) 132, 152; 17 L. R. A. (N. S.) 707; 19 L. R. A. (N. S.) 446; 27 L. R. A. (N. S.) 379. As to the rights and duties of persons driving automobiles in highways, see 13 Ann. Cas. 463; 21 Ann. Cas. 648. See, also, under (1) 3 Cyc 169; (2) 3 Cyc 275; (3) 29 Cyc 570, 580; (4) 3 Cyc 304.

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VANDALIA COAL COMPANY ET AL. v. UNDERWOOD  
ET AL.

[No. 8,901. Filed February 2, 1916.]

1. MINES AND MINERALS.—*Leases.*—*Construction.*—Coal mining leases are in two general classes, those by which the lessee is required to pay the lessor a certain amount of money at stated intervals irrespective of the productiveness of the mine, and those providing for the payment of a royalty on the quantity of mineral mined with a requirement that a stipulated amount be mined within a stated

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period of time, and a lease providing for the payment of a stipulated sum on each ton of coal mined, and declaring that in case a certain amount of coal should not be mined the lessees should pay to lessor \$600 per annum, was within the latter class. p. 680.

2. MINES AND MINERALS.—*Leases.—Construction.*—Where the provisions of a coal mine lease are so ambiguous as to make it impossible to determine therefrom when the payment of the stipulated royalty and rent was to commence, the interpretation placed thereon by the parties early in the life of the lease and prior to litigation, to the effect that the lease was to yield \$600 per annum from the date of execution, will be accepted as a practical construction by the parties. p. 681.
3. MINES AND MINERALS.—*Leases.—Exploration.—Failure to Discover Mineral.—Liability of Lessee.*—As a general rule, where a lease is executed for the purpose of exploring for, mining and taking out merchantable mineral and it thereafter appears that no mineral is to be found, the lessee is not charged with the consideration. p. 682.
4. MINES AND MINERALS.—*Leases.—Construction.*—Where a mining lease provided that it should continue for fifteen years unless the minable coal in the land should be sooner exhausted, that the lessee should pay a fixed royalty, and, in case the royalty did not reach a minimum sum, should pay that sum per annum, and that the lessee should have the right to abandon the lease at any time on account of the thinness of coal, and authorized the lessee to remove through lessor's land coal found in the adjoining land, and the lessee thereafter opened a mine and exhausted all the coal in lessor's land, the lessee was not liable for the payment of the royalty or the stipulated annual sum after the exhausting of the coal, though there was no formal surrender of the lease prior to the cessation of operations for coal in the adjoining land. p. 682.

From Putnam Circuit Court; *James P. Hughes*, Judge.

Action by James L. Underwood and another against the Vandalia Coal Company and another. From a judgment for plaintiffs, the defendants appeal. *Reversed.*

*Henry W. Moore* and *Davis & Bogart*, for appellants.

*Everett McCullough*, *H. L. Fisher* and *G. S. Payne*, for appellees

MORAN, J.—Appellees recovered a judgment against appellants in the sum of \$433.97, as an an-

nuity alleged to be due them under a lease executed to appellant, William W. Ray, on a 40-acre tract of real estate in Clay County, Indiana, authorizing the lessee to operate for and mine coal and other minerals. The lease at the time of the commencement of the action was held by appellant, Vandalia Coal Company, by assignment. Many questions are presented on the rulings on the pleadings, but the nature of the same is such that they can be disposed of under the assignments of error questioning the correctness of the conclusions of law rendered by the court on the facts specially found.

The correctness of the conclusions of law involves the construction of the lease, which is the foundation of the action and which is a part of the special findings of fact. The lease was entered into on October 1, 1904, and provides among other things that it was to continue for fifteen years unless the minable coal in the land and adjoining lands should be sooner exhausted, but the annuity was not to be paid after the exhaustion of the coal. The lessee to enter upon the lands and make search for coal within ninety days from the date of the execution of the lease, and if the coal was found in sufficient quantity and quality and the roof of sufficient strength to justify mining, to sink a shaft and have the same completed for operation within six months and from thence to mine coal and pay the lessors for all coal caught on a screen of a certain size, ten cents per ton, to be payable between the fifteenth and twentieth of each month for coal mined during the preceding month. The nut and slack coal to be free of royalty except when worked on mine run basis. The lessee to pay from date to make the royalty amount to \$600 annually, or in default, to pay the sum each year after the completion of a shaft or the commencing of mining operations and any sum paid



in excess of royalty on coal mined to be deducted out of any excess over \$600 in any year or years thereafter. The annuity not to be payable until after the expiration of one year from the commencement of mining operations. The failure to sink a shaft or begin mining operations within the time stipulated, lessee to pay at the expiration of said time \$600 to lessors as advance royalty to be deducted as hereinbefore provided. The lessee reserved the right to abandon the lease at any time on account of the thinness of coal. A failure on the part of lessee to comply with the covenants of the lease was to render the lease null and void.

The controlling question for the decision of the court is the amount of royalty or annuity, if any, that is due the lessors by the terms of the lease and the facts found by the court. On January 16, 1905, a shaft was completed on the land lying immediately east of appellees' land and which was in the same quarter section as that of appellees; all of which quarter section was leased at the same time, for the purpose of operating for and mining coal. This was the only mine opened under the lease, and from this shaft operations were commenced and 751.55 tons of coal mined on appellees' land, for which they received a royalty of \$75.15. On November 21, 1905, appellant paid appellees \$600 and in October, 1906, an additional \$600 as advanced royalty. The court found that on account of the thinness of the vein and the poor quality of the coal in the lands of appellees, coal could not have been mined with ordinary mining facilities during the year of 1906, and in none of the succeeding years up to and including the year 1911, and during these years there was no minable coal in appellees' land, and the term, "minable coal", as used in the lease had reference to coal that could be mined and

marketed at a profit to the operator under ordinary mining and marketing conditions. In June, 1907, appellant ceased mining operations and abandoned the mine in appellees' land, and on December 24, 1907, mining operations ceased as to the entire 160 acres. In January, 1908, appellant removed its personal property from the mine and dismantled the building used in connection with mining operations with the knowledge of appellees. On the facts found by the court of which the above is a brief summary, the conclusion of law was that there was due appellees as unpaid annuity \$325 from October 1, 1906, to June 30, 1907, with six per cent interest.

Recurring again to the lease, it will be remembered that it provides that the annuity should not be payable after the exhaustion of coal and that sufficient coal should be mined to make the royalty amount to \$600 annually, or in default to pay said sum each year after the completion of a shaft or the commencing of mining operations, and any sum paid in excess of the royalty on coal mined should be treated as advanced royalty to be deducted out of any excess over \$600 in any year or years thereafter, with the proviso that the annuity was not to be payable until after the expiration of one year from the completion of the shaft or the commencement of operations on appellees' land. Appellant plants itself on two legal propositions, (1) that when parties enter into an agreement in regard to a thing, which, unknown to both parties, is nonexistent at the time, the mistake avoids the contract, as the thing agreed upon ceased to be possible before the agreement was made; there being no subject-matter, there could be no contract in reference thereto; (2) the lessee in a lease of the character under consideration determines whether the minable coal is exhausted, or the condition of the same renders operation unprof-

itable, and that a surrender or termination of the lease is not necessary in order to resist payment of rent or royalty, on the ground that it had not accrued by reason of the nonexistence of minable coal; that the contract is based on a royalty, and that a recovery can be had under the same only on the theory that minable coal existed. On the other hand, it is appellees' contention that under the lease, appellant was liable for the rent or royalty so long as it held under the lease and that it is no defence to the collection of the minimum rent or royalty that the mine became unprofitable. Appellant and appellees use the words "rent", "royalty" and "annuity" interchangeably.

The coal industry, however, seems to recognize two general classes of mining leases, (1) the lease which requires the lessee to pay the lessor a

1. certain amount of money at stated intervals as a "dead rent", irrespective of the productiveness of the mine; (2) the payment of royalty on the quantity of mineral mined, with the requirement that a stipulated amount be mined within a stated period of time, or upon failure to do so to pay a certain amount of money equal to the income that would have been received by the landowner had the mineral been mined. *Ridgely v. Conewago Iron Co.* (1893), 53 Fed. 988; *Muhlenberg v. Henning* (1887), 116 Pa. St. 138, 9 Atl. 144; *Diamond Iron Min. Co. v. Buckeye Iron Min. Co.* (1897), 70 Minn. 500, 73 N. W. 507. The lease in this case must be considered in the light of the authorities as falling within the class that is based upon a royalty; the consideration to the landowner was a stipulated sum on each ton mined, the minimum production not to yield less than \$600 per annum, with provisions for a like sum per annum for failure to mine. This leaves for consideration the

period for which the royalty should be paid under the facts specially found.

The quantity of coal mined, it will be noticed, did not at the fixed royalty produce the minimum rental per annum, as provided by the lease, hence it need not receive further attention; as it was held by this court in *Vandalia Coal Co. v. Underwood* (1913), 55 Ind. App. 91, 101 N. E. 1047, that in a lease identical with the one under consideration and on real estate adjoining appellees' that where the royalty per ton on coal actually mined did not produce the minimum royalty in any one year, the payment of the minimum royalty of \$600 was required, together with the royalty per ton on the coal actually mined during that year, and the lessee could obtain credit under such circumstances for the excess paid only in a subsequent year, where the royalty per ton produced an excess over \$600, and when it did, the excess over \$600 paid in the previous year should be credited to the lessee.

This lease bears date of October 1, 1904, and provides that the lessee

“agrees to pay from date to make the royalty thereon amount to \$600 annually, or in

2. default thereof, to pay such sum each year after the completion of shaft or the commencing of mining operations, and any sum paid in excess of royalty on coal mined shall be deducted out of any excess over \$600 in any year or years thereafter. \* \* \* Said annuity shall not be payable until after the expiration of one year from the completion of a shaft or the commencement of mining operations in said land \* \* \* upon failure of said second party to sink said shaft or begin mining operations within the time heretofore stipulated, said second party agrees to pay at the expiration of said time the sum of \$600 to first parties

as advanced royalty to be deducted as hereinbefore provided.”

The foregoing provisions of the lease are so ambiguous as to make it impossible from the language of the lease to determine from what date the royalty of \$600 was to commence. Within a short time after the first year had elapsed from the execution of the lease, and much less than a year from the completion of the shaft appellant paid appellees \$600, hence the interpretation placed on the lease by the parties early in the life of the same and before any litigation arose is entitled under the circumstances to great weight, and will be treated by the court as a construction placed thereon that the lease was to yield \$600 to the lessors from the date of the execution. *Scott v. Lafayette Gas Co.* (1908), 42 Ind. App. 614, 86 N. E. 495.

It may be stated generally that a lease executed for the purpose of exploring for, mining and taking out merchantable mineral presupposes the existence of the same, and upon its appearing that

3. no such mineral is to be found the purpose of the lease fails. A lease of this character implies that the mineral required to be mined
4. exists in minable quantities and when it does not the scheme fails, and the lessee should not be charged with the consideration. *Blake v. Lobb's Estate* (1896), 110 Mich. 608, 68 N. W. 427; *Diamond Iron Min. Co. v. Buckeye Iron Min. Co.*, *supra*; *McCahan v. Wharton* (1888), 121 Pa. St. 424, 15 Atl. 615; *Timlin v. Brown* (1893), 158 Pa. St. 606, 28 Atl. 236; *Muhlenberg v. Henning*, *supra*; *Gribben v. Atkinson* (1887), 64 Mich. 651, 31 N. W. 570; *Colorado Fuel, etc., Co. v. Pryor* (1898), 25 Colo. 540, 57 Pac. 51; *Hiller v. Ray* (1910), 59 Fla. 285, 52 South. 623, 20 Ann. Cas. 1162. In *Diamond Iron Min. Co. v. Buckeye Iron Min. Co.*, *supra*, in

construing a lease similar in many respects to the lease here under consideration, it was held that the mere fact that the leased premises proved to be less valuable than supposed, or the nonexistence of things which were matters of inducement to the execution of the contract was no defence to an action for rent, but added, "The case is entirely different where the thing contracted for, and which constituted the subject-matter of the contract, had no existence. \* \* \* The very covenant which provides for the payment of a minimum royalty also provides for giving the defendant credit on the output of subsequent years for the amount previously paid in excess of the quantity actually mined. It seems to us that this provision for credit of advance royalties is based on the assumption that there was ore which the defendant might have raised during such prior year or years. Otherwise expressed, this covenant is not one to pay royalty, whether ore exists or not, but to pay royalty, if ore exists whether it is mined or not." In *Colorado Fuel, etc., Co. v. Pryor, supra*, 549, the court, in construing a lease executed for coal purposes, said, "By the transaction the lessor expected to receive compensation in the way of royalty, and the lessee profits from the operation of the leased premises as a coal mine; so that the benefits thus realized would be mutual. Unless coal was found of a merchantable grade which could be produced at a reasonable profit, or if that discovered was valueless, to require the lessee to mine it and pay royalty on the production would impose a burden without any benefit in return. \* \* \* unless coal actually existed on the premises of a merchantable grade, which could be produced at a reasonable profit, or, if none existed, or that which was found was valueless, then, under this contract of lease, it would be under no such

obligation.” In *Muhlenberg v. Henning, supra*, the supreme court of Pennsylvania held that it was the duty of the lessee to search for and find the mineral, and if found in sufficient quantity and of proper quality, the amount to produce the minimum stipulated royalty would have to be raised, and failing to do so, the minimum royalty per year would have to be paid. In *Timlin v. Brown, supra*, a distinction is made between a lease of a workable and a marketable mine and a lease to explore for minerals; as to the workable and marketable mine the only element of uncertainty was the quantity of the mineral and the lessee took the risk by the unqualified covenant to pay a fixed minimum royalty. In this connection it was said, “There is nothing in the contract indicating any intention to modify or relieve the defendants from their absolute obligation to pay on the contingencies of the mine proving unprofitable, or of exhaustion of the coal before the end of the term \* \* \* . This is not the case of parties dealing under a mutual mistake as to the existence of the subject of a contract, where afterwards it was proved to have had no existence.” The lease under consideration differs from the lease in that case in that the term of existence of the lease in the case at bar is fifteen years, unless minable coal be sooner exhausted, and the annuity was not to be payable after the exhaustion of the coal. In *McCahan v. Wharton, supra*, a contract was for the purpose of mining ore, and when found in sufficient quantity to justify shipping, the royalty not to be less than fifteen cents per ton on 2,500 tons each year, and it was held to be a good defence to the demand for the annual minimum royalty that sufficient ore to justify digging and shipping was not found, holding that the manifest intention of the parties was to make the liability subject to the contingency of finding a sufficient



quantity to justify shipping. "When, therefore, by the terms of the lease, or the circumstances, it is apparent that the existence of mineral is to be determined by the operation under the lease, then the non-existence or subsequent exhaustion of the mineral terminates the lessee's liabilities thereunder." 1 Barringer & Adams, Mining 89. It was held in *Ellis v. Cricket Coal Co.* (1914), 166 Iowa 656, 148 N. W. 887, where the lease was to continue for a period of twenty years or until all the merchantable and minable coal had been exhausted, that the lessee undertook only to mine until the minable coal was taken from the land, and when the coal had been removed, the contract was at an end. To the same effect is *Bannon v. Graeff* (1898), 186 Pa. St. 648, 40 Atl. 805.

After coal had been exhausted on appellees' land, the lessee was not bound to surrender the lease formally, for the lease gave appellant the right to remove through appellees' land, free of charge, mineral found on adjoining land, and from January 1, 1906, the time that the coal was found to have been exhausted in appellees' land, up until it was found that coal was exhausted in the whole quarter section, and an abandonment of the entire tract, we do not think that appellant could be held liable for royalty on coal that did not exist in appellees' land, by reason of the provisions of the lease. It, therefore, follows that appellant was liable only for the royalty of \$600 per annum from October 1, 1904, the date of the lease, to January 1, 1906, the date when coal was found by the court to have been exhausted on appellees' land, and the court erred against appellant in stating its conclusions of law.

The state of the issues is such that the ends of justice will best be subserved by the granting of a new trial. Judgment reversed with instructions to

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the trial court to grant a new trial, and for further procedure not inconsistent with this opinion.

NOTE.—Reported in 111 N. E. 329. As to leases and licenses under law of mines, see 91 Am. St. 881. See, also, under (1) 27 Cyc 710, 712; (2) 9 Cyc 588; 27 Cyc 715; (3) 27 Cyc 719; (4) 27 Cyc 718-720.

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KIXMILLER v. BALTIMORE AND OHIO SOUTHWESTERN  
RAILROAD COMPANY.

[No. 8,814. Filed February 3, 1916.]

1. EASEMENTS.—*Conveyances*.—*Effect*.—Where a deed conveying land to be used for a factory site by its terms also granted a right of way over a strip lying between the land conveyed and the right of way of a railroad company, the right acquired was in the nature of an easement appurtenant to the lands conveyed and passed by successive mesne conveyances of the land. p. 691.
2. EASEMENTS.—*Construction*.—*Construction by Parties*.—Where the grantor of land for a factory site, together with a right of way over a strip still retained by grantor, silently acquiesced in the acts of the grantee and another in procuring a side track to be constructed over such strip and used for shipping purposes of the factory erected on the land conveyed, the facts were sufficient to characterize the easement granted as being broad enough in the contemplation of the parties to include the right to cause the side track to be laid and used as indicated. p. 692.
3. EASEMENTS.—*Change in Easement*.—*Easement Appurtenant*.—An easement appurtenant is a burden upon the servient estate which can not be used for a purpose beyond that which was in contemplation of the parties at the time of its creation, nor for the benefit of lands other than those to which it adheres, except by consent of the owner of the servient estate. p. 692.
4. EASEMENTS.—*Easement Appurtenant*.—*Severance*.—*Change*.—An easement appurtenant can not be severed from the estate to which it is attached and be made the subject of an independent conveyance, nor can it be changed to an easement in gross by any act of the owner of the dominant estate. p. 693.
5. ESTOPPEL.—*Equitable Estoppel*.—*Use of Easement*.—Where the owner of land conveyed a portion thereof to be used for a factory site, and also granted a right of way over an adjoining strip between the land conveyed and the right of way of a railroad company, on which strip a side track was subsequently built, and after the building of such side track grantor sold the remaining land to plaintiff, including the strip on which the side track was located, and plaintiff platted the land so purchased by him for factory sites,

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and after a conveyance by the grantee of the right of way to the railroad company, the latter extended the side track on a way laid out by plaintiff, to which plaintiff made no objection, plaintiff was estopped from contesting the right to use the strip of ground over which the side track was laid by the railroad company for the benefit of a manufacturing corporation located on land laid out by him, and which was inaccessible but for such side track. pp. 693, 696.

6. APPEAL.—*Review.—Decision.—Inferences.*—In support of the findings, it is the duty of the court on appeal to indulge all inferences that may be reasonably deduced from the evidence. p. 695.

7. EASEMENTS.—*Occupancy.—Right to.*—Where a manufacturing company is entitled to use a strip of ground for a right of way, its occupancy by a railroad company as agent for its benefit is not unlawful. p. 696.

From Knox Circuit Court; *B. M. Willoughby*, Judge.

Action by Simon Kixmiller against the Baltimore and Ohio Southwestern Railroad Company. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

*Shuler McCormick* and *Wm. Kixmiller*, for appellant.

*W. R. Gardiner, C. K. Tharp, C. G. Gardiner, W. C. Johnson* and *Edward Barton*, for appellee.

CALDWELL, J.—Appellant brought this action to recover from appellee the possession of a narrow tract of real estate, situate along the north side of the latter's right of way in the city of Vincennes, and also for damages for the alleged unlawful holding of such real estate for a number of years. The lands described in the first paragraph are 25 feet wide and 7.63 chains long, containing .28 of an acre, more or less. The strip described in the second paragraph is a part of that described in the first paragraph. It is 20 feet wide and 160 feet long. The eastern terminus is the same as that of the entire strip, and its center line is the continuation of the center line of a sidetrack extending from the west end of the entire strip to the west end of the strip

described in the second paragraph of complaint. Appellee filed an answer in general denial, and the cause being at issue was tried by the court. The decision and judgment were in favor of appellee. On this appeal, appellant presents the single question of the sufficiency of the evidence to sustain the decision.

The material part of the evidence is to the following effect: January 21, 1892, the Vincennes Coal Company, under which both appellant and appellee claim, was the owner of a large tract of land, lying along the north line of the right of way of the Ohio and Mississippi Railroad Company, appellee's predecessor, which tract included the various parcels of land hereinafter mentioned. On that day the coal company conveyed to the Vincennes Board of Trade by warranty deed a two-acre tract situated along the north side of the strip described in the first paragraph of complaint, and being of the same length as the strip. Only such strip intervened between the right of way and the lands conveyed. The strip of ground was not conveyed, but by the terms of the deed a way over it was granted as indicated by the following language contained in the deed: "With a right of way over and along a strip of ground twenty-five feet in width between the above described land and the right of way of the Ohio and Mississippi Railway Company." The board of trade purchased the two-acre tract for the purpose of locating a spoke factory on it, and to that end, the next day, January 22, 1892, conveyed the tract and also the right of way over the 25-foot strip to Charles L. Wayman. Among the inducements offered to Wayman to establish the spoke factory on the two-acre tract was the agreement of the board of trade to procure the railroad company to extend a sidetrack along the strip.

Thereupon, in January, 1892, the railroad company, by arrangement with the board, constructed a side-track branching from its main line at the west end of the strip and extending eastward over it to a point 160 feet west of the east end. At the same time Wayman, associated with others, commenced to build a spoke factory on the two-acre tract, and on its completion in a few weeks, proceeded to operate it. The Wayman Company and its successor, The Security Spoke and Manufacturing Company, continued to operate the factory until 1902 or 1903, when a part of the plant was destroyed by fire. The sidetrack was used in shipping raw material to and the finished product from the factory.

In May, 1893, appellant purchased from the coal company a tract of land adjoining the two-acre tract on the east and abutting on the north line of the railroad right of way. The deed executed by the coal company to him included in the conveyance the 25-foot strip south of the two-acre tract, but with a reservation expressed in the following language: "Subject to the right of way over said ground granted by said Vincennes Coal Company to the Vincennes Board of Trade, their successors, and assigns by its deed", etc. At the time of this conveyance, the sidetrack over the strip was being used for transportation purposes in connection with the operation of the spoke factory. In May, 1896, there was duly placed on record in the recorder's office of Knox County a plat of an addition known as the "Manufacturers' Subdivision" adjoining the two-acre tract on the west and the railroad right of way on the north. The plat designated as Hack Street, a strip of ground 20 feet wide immediately north of the right of way and abutting against the 25-foot strip. In 1901, appellant caused the lands

so purchased by him to be platted as a subdivision, and May 12, 1904, caused the plat to be recorded. This plat designated, as Hack Street, a strip of ground 25 feet wide and extending the full length of the plat and abutting on the north line of the right of way of the railroad company. This strip is an extension of the 25-foot strip south of the two-acre tract.

In 1903, the Vincennes Canning and Packing Company, a corporation, was organized. Appellant was a stockholder and at one time a director in this company. To be used as a factory location, it purchased from appellant lots 1 to 5, inclusive, in the southwest corner of his subdivision and abutting on the spoke factory two-acre tract, and the strip south of it. In 1904, it built its factory on these lots. Under date of July 8, 1904, the canning company contracted with appellee to extend the spoke factory sidetrack along the 25-foot strip eastward 160 feet to the canning factory property, and thence a distance over the extension of the strip designated as Hack Street along the south side of such property, and to that end the canning company agreed to procure the necessary right of way. On the same day, the Security Spoke and Manufacturing Company executed to appellee its warranty deed purporting to convey the strip of ground 160 feet long and 20 feet wide, described in the second paragraph of complaint, for so long a time as the contract executed the same day should remain in force. Appellee thereupon extended the sidetrack the distance of 160 feet over said strip, to the canning factory property. Appellee thereafter used the entire sidetrack, including the extension thereof, in transporting raw material to and the finished product from the canning factory, continuously until 1907 when the Dyer Bean Company

succeeded the canning company. The former continued to operate the factory and to utilize the sidetrack for shipping purposes. During all the time involved, the sidetrack afforded the only means of shipment to and from the factory. The evidence showed its business to be growing. In the year immediately preceding the trial, it handled 860 carloads on the sidetrack.

It is a reasonable inference from the evidence that both appellant and the canning company of which he was a stockholder and director as indicated, in the building of the plant and the sale and purchase of the lots to that end, contemplated the extension of the sidetrack, as it was very soon thereafter extended, and its use for shipping purposes in connection with the operation of the factory. During all the time involved, appellant lived one-fourth of a mile west from the sidetrack and, during a part of the time, he operated a brickyard near thereto. The evidence is sufficient to support a very strong inference that he had knowledge, at the time, that the sidetrack was being extended and of the purpose of such extension and the contemplated use and the use actually made of it throughout the succeeding years. Appellant does not deny these propositions. This action was commenced in September, 1911. He does not claim that he objected to the extension of the sidetrack. He first objected to its use shortly before commencing the action.

Proceeding to determine the sufficiency of the evidence, it is conceded by the parties that the deed by which the coal company conveyed to the

1. board of trade the two-acre tract of land, by its terms granted also a right of way in the nature of an easement appurtenant to the lands conveyed over the 25-foot strip, and that by successive mesne conveyances, the Security Spoke and



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Manufacturing Company became the owner of such tract with the easement appurtenant thereto. The concession that such easement was appurtenant or attached to the land and that it passed as an incident in the conveyance thereof rather than that it was in gross as a mere individual or personal right in the strip of land disconnected from the ownership of the tract, is in harmony with the authorities. *Hoosier Stone Co. v. Malott* (1891), 130 Ind. 21, 29 N. E. 412; *Louisville, etc., R. Co. v. Malott* (1893), 135 Ind. 113, 34 N. E. 709; Jones, Easements §18, *et seq*; 14 Cyc 1141, 1184.

The two-acre tract was conveyed by the coal company to the board of trade, and by the latter to

Wayman, to be used as a factory site. Way-

2. man and his associates, very soon after acquiring title, with the active assistance of the board of trade, and at least the silent acquiescence of the coal company which owned the fee in the servient estate, procured to be constructed over the latter the sidetrack, and commenced and continued its use for shipping purposes in connection with the building and operating of the spoke factory. These facts are sufficient to characterize the easement granted as being broad enough in the contemplation of the parties to include the right to cause the sidetrack to be laid and used as indicated. *Lake Erie, etc., R. Co. v. Michener* (1889), 117 Ind. 465, 20 N. E. 254; 14 Cyc 1201.

An easement appurtenant is a burden upon the servient estate. The owner of the dominant estate can not by any act of his own, independ-

3. ent of the consent of the owner of the servient estate, use the easement or authorize it to be used for the benefit of any lands other than those to which it adheres, or without such consent, broaden the use beyond what was within the contemplation

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of the parties at its creation. Otherwise the burden upon the servient estate would thereby be increased without the consent of the owner thereof. *Hoosier Stone Co. v. Malott, supra; Louisville, etc., R. Co. v. Malott, supra; Jones, Easements* §§360, 363, 368; *Wood v. Woodley* (1912), 41 L. R. A. (N. S.) 1107 note; 14 Cyc 1209. Such an easement can not be severed from the estate to which it is attached

4. and made the subject of an independent conveyance; nor can an easement appurtenant by any act of the owner of the dominant estate be changed into an easement in gross. *Moore v. Crose* (1873), 43 Ind. 30; *Wilson v. Ford* (1913), 209 N. Y. 186, 102 N. E. 614; *Reise v. Enos* (1890), 76 Wis. 634, 45 N. W. 414, 8 L. R. A. 617; 14 Cyc 1185.

It follows that as against appellant, who at that time owned the fee to the 25-foot strip, the deed executed by the Security Spoke and Manu-

5. facturing Company to appellee July 8, 1904, purporting to convey the strip of ground 160 feet long abutting at its east end on the premises owned by the canning company, was not effective to extend to the latter premises the easement with which the strip of ground described in the deed was burdened; or to create in such strip of ground an easement in gross for the use and benefit of the owners of the canning factory property, or to amount to authority in appellee to enter upon such strip of ground, and along it to extend the spoke factory sidetrack to the canning factory property, for its use and benefit or for the use and benefit of the owners of such property. It is said of such a deed that it is either void, or that it will extinguish the right theretofore existing in the grantor. *Phillips v. Rhodes* (1843), 48 Mass. 322. It is apparent that the deed was void in the sense that it was not effective to convey title to appellee, or to grant the use

of the strip of ground for right of way purposes for the benefit of the canning company property. It is conceded that at the time of the execution of the deed, the easement in the strip of ground was in force as appurtenant to the two-acre tract owned by the spoke company, the grantor in the deed. As such owner, the spoke company had a right to the use of the easement in connection with the occupancy of such tract, unimpaired by any act of the owner of the fee or others. Such right might constitute a barrier to the creation of an easement over the strip for the benefit of the canning company property. Hence, in order to accomplish the latter result, it may have been necessary either to induce the spoke company to abandon its easement or procure its consent thereto. The deed was executed as a part of the proceeding had, preparatory to the extension of the sidetrack. It, therefore, follows that the fact of the execution of the deed might be considered as some evidence indicating either a purpose to abandon the easement, or the consent of the spoke company that the strip might be used for the benefit of the canning company. An inference to either of these effects might reasonably be deduced from the fact of the deed under the circumstances. Since the deed was executed to appellee rather than to appellant, the owner of the fee, the latter is the more reasonable deduction. Either of these deductions is in harmony with the decision below, and, it is, therefore, immaterial which we presume to have been made by the trial court. In either case the spoke company as an opposing factor was eliminated.

Turning again to the evidence, appellant purchased the grounds subsequently platted by him, and also the 25-foot strip, subject to the spoke company's easement. This strip abutted directly on the grounds purchased. Unexplained, it is reason-

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able to presume that the strip was purchased for right of way purposes to be used in connection with such grounds. Other facts are in harmony with such presumption. Thus the sidetrack extending along the strip to within 160 feet of such grounds, was in active use. Hack Street having been laid out as a western extension of the strip, subsequently in platting his grounds appellant indicated Hack Street as an eastern extension of the strip. These facts are not in accord with an assumption that appellant was holding the strip for some personal purpose disassociated from his platted grounds. Under such circumstances, he sold the five lots to the Vincennes Canning and Packing Company for factory purposes. He was interested in such company as a stockholder and director. The factory site had no direct railroad connection, whereupon the sidetrack by the procurement of the company was immediately extended as indicated, and under circumstances sufficient to charge appellant with knowledge of the fact. The sidetrack was thereafter for a number of years used for the benefit of the canning company, and, thereafter, for the benefit of its successor. Appellant objected neither to the extending nor the use of the sidetrack. As we have indicated, these circumstances are sufficient foundation for an inference that in the sale and purchase of the lots, the parties contemplated the extension of the sidetrack and its use for the benefit of the factory to be erected and operated on the lots, and that appellant at least by implication assented thereto. It is a fair inference that on the faith of such implied consent and that the sidetrack might be so extended and used, the lots were purchased, the plant built and equipped, and that an important business has

6. been developed. It is our duty in support of the decision below to indulge all inferences

that may be reasonably deduced from the evidence. In our judgment, under the evidence, appellant is estopped from contesting the

5. right to use the strip of ground described in the complaint, and the sidetrack thereon for the benefit of the canning factory property, now the Dyer Bean Company. See the following: *Lake Erie, etc., R. Co. v. Michener, supra*; *Messick v. Midland R. Co.* (1891), 128 Ind. 81, 27 N. E. 419; *Campbell v. Indianapolis, etc., R. Co.* (1887), 110 Ind. 490, 11 N. E. 482; *Indianapolis, etc., Traction Co. v. Arlington Tel. Co.* (1911), 47 Ind. App. 657, 95 N. E. 80; *Jann v. Standard Cement Co.* (1913), 54 Ind. App. 221, 102 N. E. 872; *Pierce v. Cleland* (1890), 133 Pa. St. 189, 19 Atl. 352, 7 L. R. A. 752; *Curtis v. LeGrande, etc., Co.* (1890), 10 L. R. A. 484, note.

The Dyer Bean Company, as the successor of the Vincennes Canning and Packing Company having the right to use the strip of ground as in-

7. dicated, its occupancy by appellee as agent for the benefit of the Dyer Bean Company is not unlawful. *Louisville, etc., R. Co. v. Malott, supra*; *Spencer Stone Co. v. Sedwick* (1915), 58 Ind. App. 64, 105 N. E. 525; Jones, Easements §368.

The evidence is sufficient to sustain the decision, and the judgment is affirmed.

NOTE.—Reported in 111 N. E. 401. As to what is equitable estoppel, see 134 Am. St. 172. See, also, under (1) 14 Cyc 1140, 1184; (2) 14 Cyc 1201; (3) 14 Cyc 1206, 1209; (4) 14 Cyc 1185; (5) 16 Cyc 765, 791; (6) 3 Cyc 308; (7) 14 Cyc 1208.

## GRAHAM v. HENDERSON ELEVATOR COMPANY.

[No. 8,939. Filed February 3, 1916.]

1. PLEADING.—*Complaint.—Initial Attack on Appeal.*—The sufficiency of a complaint can not be questioned for the first time on appeal under §348 Burns 1914, Acts 1911 p. 415. p. 699.
2. APPEAL.—*Assignment of Errors.—Sufficiency.*—Assignments of error dealing with abstract propositions of law, questions of fact and argument, present nothing for review. p. 699.
3. APPEAL.—*Assignment of Errors.—Matters Assignable.*—That the evidence is not sufficient is not the subject of an independent assignment of error on appeal. p. 699.
4. APPEAL.—*Briefs.—Waiver of Error.*—Questions arising on alleged error and not referred to under points and authorities in appellant's brief are waived. p. 699.
5. PLEADING.—*Complaint.—Theory.*—The theory of a complaint is to be determined from its general scope and tenor and not from fragmentary statements, detached parts or conclusions of the pleader, and that theory will be adopted which is most apparent and clearly outlined by the leading averments. p. 701.
6. SALES.—*Action for Breach of Contract.—Complaint.*—A complaint alleging that certain letters therein set out relative to a sale of corn had passed between plaintiff and defendant, that thereafter plaintiff's representative examined the corn, and that plaintiff and defendant "entered into the agreement as aforesaid" whereby defendant agreed to deliver to plaintiff a specified quantity of corn on terms therein specified, was on the theory of an action for the breach of a written contract evidenced by such letters, there being no other "agreement" alleged. p. 701.
7. FRAUDS, STATUTE OF.—*Sufficiency of Memorandum.—Sales of Goods.*—A letter from defendant dated February 1, asking plaintiff's best offer on 15,000 bushels of corn, a letter from plaintiff dated March 22, referring to conversation of the same day and confirming the purchase of 10,000 bushels of corn to be inspected by plaintiff's agent, and a letter from defendant dated March 25, asking plaintiff to send its agent as soon as weather would permit so that corn could be loaded, did not constitute sufficient memoranda to avoid the statute of frauds, since, unaided by parol evidence, they did not disclose the terms of the alleged sale or warrant the inference that the minds of the contracting parties ever met upon the terms in the letter of March 22. pp. 702, 703.
8. FRAUDS, STATUTE OF.—*Sufficiency of Memorandum.—Sales of Goods.*—The memorandum relied on to except a sale of goods from the statute of frauds may consist of letters or other writings signed by the party to be bound, and may be aided by reference to other

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writings constituting a part of the contract, but to be sufficient all the essential elements of the alleged contract must appear therefrom without resort to parol testimony. p. 703.

9. FRAUDS, STATUTE OF.—*Memorandum*.—"Party to be Charged".—The "party to be charged", under the statute of frauds, means the defendant to the action, and the memorandum must be signed by him, though it need not necessarily be signed by the plaintiff. p. 703.
10. FRAUDS, STATUTE OF.—*Sufficiency of Memorandum*.—*Sales of Goods*.—Where the party against whom liability is sought to be enforced has not signed a memorandum containing the essential elements of a contract of sale, but has signed another instrument or writing in which it is claimed such reference is made to the memorandum as to amount to an adoption and acceptance of the terms thereof, such signed instrument, to be sufficient under the statute, must contain a clear and definite reference to such memorandum and so identify it as to make its provisions a part of the signed instrument. p. 703.
11. FRAUDS, STATUTE OF.—*Memorandum*.—*Parol Evidence*.—Parol evidence may be heard to apply a contract required by the statute of frauds to be in writing to its subject-matter, or to explain latent ambiguities, but not to supply facts to show the existence of the contract or to supply any of its terms. p. 707.
12. CONTRACTS.—*Letters*.—*Evidence*.—Proof that a letter was dictated on a certain date and that the writer had a telephone conversation with the addressee, as therein mentioned, was insufficient to warrant the consideration of such letter as one of a series constituting the alleged contract of the parties, in the absence of proof that such letter was actually mailed. p. 707.
13. FRAUDS, STATUTE OF.—*Pleading*.—Where a parol contract of sale within the statute of frauds is relied on by plaintiff, the defendant may claim the benefit of the statute under the issue formed by the general denial, without pleading the statute specially. p. 707.

From Daviess Circuit Court; *James W. Ogdon*, Judge.

Action by the Henderson Elevator Company against Ziba F. Graham. From a judgment for plaintiff, defendant appeals. *Reversed*.

*Alvin Padgett, W. R. Gardiner, C. K. Tharp* and *C. G. Gardiner*, for appellant.

*T. D. Slimp, M. S. Hastings, J. G. Allen, E. E. Hastings*, and *A. W. Allen*, for appellee.

FELT, P. J.—Appellee recovered a judgment against appellant for damages for breach of con-



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tract for the sale of corn. In appellant's brief under the title "Errors Relied Upon" six specifications are enumerated. The first seeks to question

1. the sufficiency of the complaint for the first time in this court, and, therefore, presents no question. §348 Burns 1914, Acts
2. 1911 p. 415; *State, ex rel. v. Bartholomew* (1911), 176 Ind. 182, 185, 95 N. E. 417, Ann. Cas. 1914 B 91; *Robinson v. State*
3. (1912), 177 Ind. 263, 266, 97 N. E. 929. The

second, third and sixth specifications of errors relied on deal with abstract propositions of law, questions of fact and argument, but bear no resemblance to a specification of error. The fourth states that the evidence is not sufficient to sustain the finding and would, in certain instances, be appropriate ground for a motion for a new trial, but is not proper as an independent assignment of error. The fifth specification of error is that the court erred in overruling appellant's motion for a new trial. Under propositions or points and authorities, the only question mentioned that, by the

4. most liberal construction, can refer to the motion for a new trial mentions the insufficiency of the evidence to support the finding, and all others are, therefore, waived. *Rook v. Strauss Bros. Co.* (1915), 58 Ind. App. 82, 107 N. E. 692, and cases cited; *White v. State* (1915), 182 Ind. 686, 107 N. E. 674; *Ward v. State* (1913), 179 Ind. 524, 526, 101 N. E. 809; *Cleveland, etc., R. Co. v. Beard* (1913), 52 Ind. App. 105, 100 N. E. 392; *Palmer v. Beall* (1915), ante 208, 110 N. E. 218. The briefs show that a new trial was asked on two grounds, viz., (1) the decision of the court is not sustained by sufficient evidence and (2) is contrary to law.

To determine the questions presented we must

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first ascertain the theory of the complaint. The complaint is in one paragraph and alleges in substance that the plaintiff is a corporation organized under the laws of the state of Kentucky; "that on February 1, 1913, the defendant, in writing, proposed to sell to the plaintiff fifteen thousand bushels of corn, which proposal in writing is as follows:

'Washington, Ind., 2-1-13.

Henderson Elevator Co., Henderson, Ky.  
Gentlemen: Please make us your best offer on fifteen thousand bushels pure white corn loaded here and on the same basis we sold you last year. This corn is even higher in quality and conditions than that we sold last year. Be sure the price you offer is your best. Yours truly, The Graham Farms. R. A. Graham.'

That on March 22, 1913, the plaintiff made an offer in writing, to purchase ten thousand bushels from defendant, which offer in writing is as follows: \* \* \*

'Henderson, Ky., March 22, 1913.

R. A. Graham, Washington, Ind. Dear Sir: Referring to conversation had today with you over the phone we are pleased to confirm the purchase from you of ten thousand bushels white corn in ear 70 lbs. to the bushel at 50 cents f. o. b. your station. Same terms as before, that is we are to furnish a man to weigh the corn and our Mr. R. L. Williams is to examine it before being loaded. As advised you, just as soon as we can possibly get him there, we will do so. Yours truly, Henderson Elevator Co. W. A. Williams, Gen'l Mgr.'

That on March 25, 1913, the defendant accepted the said written offer of the plaintiff, which acceptance in writing is as follows:

'Loogootee, Ind. 3-25-13.

Mr. Williams, Henderson Elevator Co., Henderson, Ky. Dear Sir: Please have your Mr.

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Robert Williams come down as soon as weather will permit as we want to load this corn out on short order when roads will allow hauling. We are certainly having some flood in this section. With best wishes we are, Yours truly, The Graham Farms, by R. A. Graham, General Manager.'

That the said The Graham Farms was in fact the defendant, and the said R. A. Graham and R. A. Graham, General Manager, being the same person, was the agent of the defendant; that on April 14, 1913, the said R. L. Williams and Robt. Williams, being the same person, examined the corn; that the plaintiff and defendant entered into the agreement, as aforesaid, whereby the defendant agreed to deliver to the plaintiff ten thousand bushels of white corn at fifty cents a bushel f. o. b. at Graham's station on the Chicago, Eastern Illinois Railroad in Daviess County, Indiana; that the said corn was to be delivered as aforesaid, as soon as cars could be procured in which to load the same, and the plaintiff was to pay therefor on delivery." The other averments charge performance on the part of appellee and refusal to perform on the part of appellant; that on April 11 and 14, 1913, appellee was ready, willing and able to receive and pay for the corn and so notified appellant. Prayer for damages in the sum of \$1,000.

The theory of a complaint is to be determined from the general scope and tenor of its averments and not from fragmentary statements, detached parts or conclusions of the pleader. That theory will

5. be adopted which is most apparent and clearly outlined by the leading averments.

*Osborn v. Adams Brick Co.* (1913), 52 Ind.

6. App. 175, 182, 99 N. E. 530, 100 N. E. 472. Judged by this rule, appellee's complaint is to

recover for the breach of a written contract evidenced by the several instruments set out in the pleadings for it is averred that the parties "entered into the agreement, as aforesaid", and there is no agreement aforesaid unless the writings set out show an agreement. There is no claim that anything was done under the contract to take it out of the operation of the statute, if the statute may be invoked under the issues. On this theory of the case, the sufficiency of the memoranda to take the

7. case out of the statute of frauds depends upon the meaning and effect of the writings set out in and made a part of the complaint. Appellee's letter of March 22, 1913, shows on its face that it has no reference to appellant's letter of February 1, 1913, but on the other hand refers to a conversation over the telephone about the sale of a different amount of corn. Appellee contends that appellant's letter of March 25, 1913, is an acceptance of its offer to buy 10,000 bushels of corn at 50 cents per bushel of 70 lbs. Appellant contends that the letter of March 25 has no reference to the letter of March 22, for the reason he had not then received it, knew nothing of it, and in fact did not know of its existence until April 8, 1913. Looking to the complaint, it appears that the only writing signed by appellant that is relied on to take the case out of the statute of frauds, is the communication dated March 25, 1913. It makes no reference to appellee's letter of March 22, 1913, and without resort to parol proof it can not be known that it was written in answer to the letter of March 22, 1913, or that it was intended as an acceptance of the proposition to buy 10,000 bushels of corn on the terms stipulated in appellee's letter of March 22. The memoranda relied on to take the transaction out of the statute of frauds may con-

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9. action. The memorandum must be signed by him but need not, necessarily be signed by the plaintiff in the suit. *Newby v. Rogers* (1872), 40 Ind. 9, 12; 20 Cyc 272. Where it is sought to enforce a contract alleged to be evidenced by a

10. memorandum sufficient to take it out of the operation of the statute of frauds, or to hold a party liable in damages for a breach of the alleged contract, and the party against whom liability is sought to be enforced has not signed any memorandum containing the essential elements of the contract, but has signed another instrument or writing in which it is claimed such reference is made to the former as to amount to an adoption and acceptance of the terms thereof, to be sufficient under the

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9. action. The memorandum must be signed by him but need not, necessarily be signed by the plaintiff in the suit. *Newby v. Rogers* (1872), 40 Ind. 9, 12; 20 Cyc 272. Where it is sought to enforce a contract alleged to be evidenced by a

10. memorandum sufficient to take it out of the operation of the statute of frauds, or to hold a party liable in damages for a breach of the alleged contract, and the party against whom liability is sought to be enforced has not signed any memorandum containing the essential elements of the contract, but has signed another instrument or writing in which it is claimed such reference is made to the former as to amount to an adoption and acceptance of the terms thereof, to be sufficient under the

statute (§7469 Burns 1914, §4910 R. S. 1881) the signed memorandum or instrument must contain a clear and definite reference to such other writing or instrument and so identify it as to make its provisions a part of the signed memorandum or instrument relied on. *Ridgway v. Ingram* (1875), 50 Ind. 145, 147, 19 Am. Rep. 706; *Pulse v. Miller* (1881), 81 Ind. 190, 191; *Thayer v. Luce* (1871), 22 Ohio St. 62, 64; *Jordan & Davis v. Mahoney* (1909), 109 Va. 133, 136, 63 S. E. 467; *Rahm v. Klerner* (1900), 99 Va. 10, 14, 37 S. E. 292; *Williams v. Morris* (1877), 95 U. S. 444, 24 L. Ed. 360, 362; *Roaring Spring, etc., Co. v. Lesser* (1912), 133 N. Y. Supp. 1032, 1033; *Willis v. Ellis* (1910), 98 Miss. 197, 207, 53 South. 498, Ann. Cas. 1913 A 1039; *Swallow v. Strong* (1901), 83 Minn. 87, 92, 85 N. W. 942; *Pierce v. Corf*, *supra*; *Wills v. Ross* (1881), 77 Ind. 1, 12, 13, 40 Am. Rep. 279; *Taylor v. Smith* (1893), 2 Q. B. 65, 69; 20 Cyc 10, and cases cited in note 10; 1 Reed, Stat. of Frauds §§343, 344. In *Ridgway v. Ingram*, *supra*, our Supreme Court said: "It seems to be well settled, that a memorandum, in order to make another writing a part thereof, so as to constitute a part of the contract, must refer to such other writing; and, that parol proof of the connection of the papers is not admissible to establish a contract required by the statute of frauds to be in writing." In *Pulse v. Miller*, *supra*, the court said: "It is not necessary that the description should be contained in one of a series of instruments; if, taking all the instruments in the series together, the description appears, it will be sufficient. In order that this should be so, the instrument containing the description must be clearly referred to and identified by the contract signed by the party sought to be charged." In *Johnson & Miller v. Buck* (1892), 35 N. J. L. 338, 344, 10

Am. Rep. 243, the rule is stated as follows: "It is not essential that the whole bargain be contained in one memorandum. It will be sufficient to satisfy the statute if its terms can be gathered from two or more detached papers, if the signed memorandum contains such reference to the other papers as to make the latter a part of the former. The connection between the signed and unsigned papers can not be made by parolevidence that they were actually intended by the parties to be read together, or of facts and circumstances from which such intention may be inferred. The connection between them must appear by internal evidence derived from the signed memorandum. Parol testimony will be received only for the purpose of interpretation or explanation, where technical terms are employed, or to identify papers which, by a reference in the signed memorandum, are made parts of it. \* \* \* In moving judgment affirming the decision of the Queen's bench, which had been reversed in the Exchequer Chamber, Lord Westbury said: 'In order to embody in the letter any other document or memorandum, or instrument in writing, so as to make it a part of a special contract contained in that letter, the letter must either set out the writing referred to, or so clearly or definitely refer to the writing that by force of the reference the writing itself becomes a part of the instrument which refers to it.' ". In Browne, Stat. of Frauds, §§345a, 346b, 348 it is said: "The note or memorandum of the oral contract which the statute requires is some writing, authenticated by the signature of the party to be charged upon the contract, or of his agent, and containing, either in terms or by incorporation of other writing referred to it, a statement of the terms of the contract and the parties to it.

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\* \* \* It is often the case that the terms of the contract are not all contained in any one paper. The question then arises, under what circumstances two or more papers can be offered in evidence as together constituting the memorandum, one only or all being signed, as the case may be. With regard to the first case, the rule is that the letter or other paper that is signed is to be regarded as incorporating and reciting any other writing referred to in it.

\* \* \* Where there is more than one signed paper, so many of them as of themselves show their relation to the contract sued upon may be taken together to make the memorandum. But if such relation does not appear from the writings themselves, it cannot be established by extrinsic evidence." In *Wright v. Weeks* (1862), 25 N. Y. 153, 160, it is said: "So an agreement need not be perfect by itself. It may be made certain and definite, and thus valid, under the statute, by reference to another writing, as well as incorporating the entire contract in one paper. But the reference must be to another paper, and so distinct as to make that paper a part of the contract itself. (*Kenworthy v. Schofield* [1824] 2 Barn. & Cr. 945). The parties cannot unite two papers, so as to make them unitedly constitute a valid contract, unless they are physically joined, or the intention to unite them appears on the face of the papers. If the connection between two papers depend upon verbal testimony, or if the reference in the written memorandum is to something verbal, the whole evil intended to be remedied by the statute will be experienced." In *Brown v. Whipple* (1877), 58 N. H. 229, it is said: "Unless the essential terms of the sale can be ascertained from the writing itself or by reference in it to something else, the writing is not a compliance with the statute

\* \* \* . A defective reference can no more

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be cured by parol than any other defective part of the memorandum. \* \* \* But the question is, not whether there is an infinitesimal or other amount of circumstantial evidence from which a jury may find the fact not stated in writings, but whether the court does find, upon a fair legal construction of the writings, that the fact is stated in them."

Parol testimony may be heard to apply the contract to its subject-matter, or to explain latent ambiguities, but not to supply facts to show

11. the existence of the contract or to supply any of its terms. *Wills v. Ross, supra; Porter v. Patterson, supra; Williams v. Morris, supra; Swallow v. Strong, supra; Brown v. Whipple, supra*; 12 Ency. Evidence 18, note 58. The writings in this case unaided by parol evidence, are insuffi-

7. cient to show the terms of the alleged sale or to warrant the inference that the minds of the contracting parties ever met upon the terms proposed in appellee's letter of March 22, 1913, or, in other words to show a contract. Therefore, the decision of the trial court is not sustained by sufficient evidence and is contrary to law. But if it could be held that the memoranda relied on are sufficient, the appellee has failed in its proof.

12. There is no evidence that the letter of March 22 was mailed. Proof that it was dictated on March 22 and that there was a telephone conversation on that day between appellant and W. A. Williams falls short of the necessary proof. 16 Cyc 1068, 1069. But if the suit is not one for damages for the breach of a contract evidenced by a writing sufficient to take the case out of the

13. statute of frauds, but for damages for breach of a parol contract of sale, which we do not hold, still the judgment must be reversed for the reason that appellant may claim the benefit of the

statute of frauds, under the issue formed by the general denial to the complaint, without pleading the statute specially. 1 Works' Practice §627; *Suman v. Springate* (1879), 67 Ind. 115, 122; *Indiana Trust Co. v. Finitzer* (1903), 160 Ind. 647, 651, 67 N. E. 520; *Fall v. Hazelrigg* (1874), 45 Ind. 576, 580, 15 Am. Rep. 278; *Crum v. Yundt* (1895), 12 Ind. App. 308, 311, 40 N. E. 79. There is no contention but that the amount involved in the alleged sale is sufficient to render the contract unenforcible under our statute (§7469 Burns 1914, *supra*), if the statute may be invoked without pleading it. Therefore, viewing the alleged sale as evidenced by a parol agreement, the evidence is insufficient to support the finding since under the foregoing authorities appellant may claim the benefit of the statute of frauds without pleading it specially, and by failing so to do has not waived his right to claim its benefits under the issues in this case. The judgment is, therefore, reversed with instructions to sustain the motion for a new trial and for further proceedings not inconsistent with this opinion.

Ibach, C. J., Moran, Caldwell, Shea and Hottel, JJ., concur.

NOTE.—Reported in 111 N. E. 332. As to when title to goods passes to buyer, see 138 Am. St. 905. As to who must sign note or memorandum of executory contract for the sale of real property or chattels within the statute of fraud see 28 L. R. A. (N. S.) 680; 43 L. R. A. (N. S.) 410. For a discussion of several writings as amounting to a memorandum within the statute of frauds, see 2 Ann. Cas. 293; 19 Am. Cas. 1162; Ann. Cas. 1914 C 1010. As to sufficiency of signature by one party only to memorandum required by statute of frauds, see 3 Ann. Cas. 1036; 13 Ann. Cas. 1121; Ann. Cas. 1912 C 416. As to necessity of pleading the statute of frauds specially where defendant denies contract, see Ann. Cas. 1912 D 46. See, also, under (1) 3 C. J. 779; 2 Cyc 689; (2) 3 C. J. 1357; 2 Cyc 987; (3) 3 C. J. 1389; 2 Cyc 999; (4) 3 C. J. 1410; 2 Cyc 1014; (5) 31 Cyc 84; (6) 35 Cyc 623; (7) 20 Cyc 258; 261; (8) 20 Cyc 254, 258; (9) 20 Cyc 272; (10) 20 Cyc 278; (11) 20 Cyc 317; (12) 17 Cyc 412; (13) 20 Cyc 312.

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Indiana Board of Pharmacy v. Haag—60 Ind. App. 709.

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**MCGINNITY v. CRONICAN.**

[No. 8,805. Filed November 5, 1915.]

From Lake Circuit Court; *W. C. McMahan*, Judge.

*Sheehan & Lyddick*, for appellant.

*H. H. Loring*, for appellee.

PER CURIAM.—Judgment affirmed.

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**AMERICAN MAIZE PRODUCTS COMPANY v. WIDIGER.**

[No. 8,746. Filed November 16, 1915.]

APPEAL.—*Constitutional Questions.—Transfer to Supreme Court.—*

Where the record discloses that a constitutional question is involved in an appeal to the Appellate Court, and such question is duly presented by the briefs, a transfer of the cause to the Supreme Court is required.

From Lake Superior Court; *Lawrence Becker*, Judge.

Action between the American Maize Products Company and Adam Widiger. From a judgment for the latter, the former appeals. *Transferred to Supreme Court.*

*Crumpacker & Crumpacker*, for appellant.

*Gavit & Hall*, for appellee.

PER CURIAM.—It appearing from the record in this case that a constitutional question is involved, and is duly presented in briefs of counsel, this cause is transferred to the Supreme Court, under §1392 Burns 1914, Acts 1907 p. 237.

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**BROWN v. SHUPE.**

[No. 8,787. Filed November 19, 1915.]

From Huntington Circuit Court; *Samuel E. Cook*, Judge.

*Fred H. Bowers* and *Milo N. Feightner*, for appellant.

*C. K. Lucas* and *C. W. Watkins*, for appellee.

PER CURIAM.—Judgment affirmed.

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**INDIANA BOARD OF PHARMACY v. HAAG.**

[No. 8,749. Filed November 19, 1915.]

From Marion Circuit Court (20,672); *Charles Remster*, Judge.

Proceeding by the Indiana Board of Pharmacy against Louis E.



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Modern Woodmen, etc. v. Scantlin.—60 Ind. App. 710.

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Haag for the revocation of his license as a registered pharmacist. From a judgment for defendant, the plaintiff appeals. *Transferred to Supreme Court.*

*Thomas M. Honan, Frank P. Baker and Gavin, Gavin & Davis*, for appellant.

*Ryan, Ruckelshaus & Ryan*, for appellee

FELT, J.—The facts in this case are identical with those in *Indiana Board, etc., v. Haag* (1915), 60 Ind. App. 218, 110 N. E. 248, this day transferred to the Supreme Court for want of jurisdiction and for the same reason there stated this case is transferred to the Supreme Court under §1397 Burns 1914, Acts 1901 p. 565.

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MAKUTCHAN ROLLER BEARING COMPANY v.  
SCHROEDER.

[No. 8,583. Filed October 28, 1915. Rehearing denied December 15, 1915.]

From Lake Superior Court; *Lawrence Becker*, Judge.

*Sidney E. Levy* and *John M. Stinson*, for appellant.

*Fred Barnett* and *Lyle McKinney*, for appellee.

PER CURIAM.—Judgment affirmed.

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PROSE v. ANDERSON ET AL.

[No. 8,751. Filed December 15, 1915.]

From Sullivan Circuit Court; *William H. Bridwell*, Judge.

*J. W. Lindley* and *Walker & Blankenbaker*, for appellant.

*Charles D. Hunt, Gilbert W. Gambill* and *Arthur D. Butler*, for appellees.

PER CURIAM.—Judgment affirmed.

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MODERN WOODMEN OF AMERICA v. SCANTLIN.

[No. 8,734. Filed November 24, 1915. Rehearing denied February 2, 1916.]

From Warrick Circuit Court; *Roscoe Kiper*, Special Judge.

*Benjamin D. Smith* and *Edmund L. Craig*, for appellant.

*George K. Denton* and *Brill, Hatfield & Brady*, for appellee.

PER CURIAM.—Judgment affirmed.

# INDEX

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[NOTE.—The citation *American Steel, etc., Co. v. Carbone*, 484, 487 (2), indicates that the case begins on page 484, the point cited is on page 487, and that such point is numbered 2 in the margin.—REPORTER.]

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## ABATEMENT—

*Judgment.—Appeal.*—Where on the issues tendered by an answer in abatement the finding is against defendant, and on his refusal to plead over judgment is rendered against him for want of an answer to the merits, the judgment is one from which an appeal will lie, but a judgment that the action “shall not abate and said defendant herein shall plead over to the merits”, is not a final judgment and is not within any of the exceptions authorizing appeals from certain interlocutory orders.

*Bluffton, etc., Co. v. Moore-Mansfield, etc., Co.*, 567.

## ABUTTING OWNERS—

When the land of a vacated street reverts to, see DEDICATION 2.

## ACTION—

See CARRIERS 8; CONTRACTS 6; DEATH 1; HUSBAND AND WIFE 8; LANDLORD AND TENANT 3; MALICIOUS PROSECUTION 1, 2; NEGLIGENCE 1, 4, 5; NUISANCE 1; SALES 15; TRESPASS.

Against occupant, see QUIETING TITLE.

Against purchaser, see SALES 10, 11.

By seller, see SALES 5.

For breach of contract, see SALES 1.

For compensation as farm hand, see TRIAL 9.

For injuries, see RAILROADS 5.

For services, see RAILROADS 8.

Independent, see NEW TRIAL 1-5.

On policy, see INSURANCE 1, 10.

Right to dismiss, see TRIAL 4.

1. *Commencement.—“Pending Litigation”.*—Where a complaint was filed in April, 1910, and on the tenth day thereafter defendant entered appearance, and in December following withdrew such appearance, no other steps having been taken, and then in October, 1911, *alias* summons was issued on motion of plaintiff, there was, until such summons was issued, no “litigation pending” within the meaning of §4 of the act of 1911 (Acts 1911 p. 415), relating to procedure in civil cases and providing that nothing therein should apply to litigation pending at the time the act went into effect, since under §317 Burns 1914, §314 R. S. 1881, an action is commenced by the filing of a complaint, the issuance of the summons and the placing of same in the hands of the sheriff, and any effect which defendant’s appearance may otherwise have had was necessarily obviated by the withdrawal of such appearance.

*American Steel, etc., Co. v. Carbone*, 484, 487 (2).

2. *Pleading.—Averments.—Proof.*—A party may, in the same paragraph, aver more facts than are necessary to state a cause of action

**ACTION—Continued.**

and recover on proof of such of the facts so alleged as constitute a cause of action, even though some of the facts averred are not proven, and, under such circumstances the case proven is within the issues and there is neither a change of theory nor variance.

*Maywood Stock, etc., Co. v. Pratt*, 131, 141 (5).

**ADMINISTRATOR—**

See EXECUTORS AND ADMINISTRATORS.

**ADMISSION—**

Of evidence, see APPEAL 58, 59.

**ADMISSIONS—**

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**ADULTERY—**

Of wife, see HUSBAND AND WIFE 3-5, 13.

**AFFIRMANCE—**

See APPEAL 129, 130.

**AMENDMENT—**

See PLEADING 4.

Deemed made, see APPEAL 98.

**ANIMALS—**

On tracks, see RAILROADS 1-7.

**ANSWERS TO INTERROGATORIES—**

See APPEAL 117, 118.

**APPEAL.**

- I. APPELLATE JURISDICTION, 1.
- II. DECISIONS REVIEWABLE, 2-7.
- III. RIGHT OF APPEAL, 8-13.
- IV. PRESENTATION AND RESERVATION IN LOWER COURT,
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  - (b) MOTION FOR NEW TRIAL, 18-22.
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- VII. ASSIGNMENT OF ERRORS, 28-39.
- VIII. BRIEFS, 40-53.
- IX. REVIEW,
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Will lie from an action of the Board of Commissioners in dismissing a petition praying for an election under the Proctor Law, see INTOXICATING LIQUORS.

**I. APPELLATE JURISDICTION.**

1. *Appeal from Interlocutory Orders.*—Jurisdiction of an appeal from an interlocutory order is in the Supreme Court only.  
*Pottlitzer v. Citizens Trust Co.*, 45, 68 (14).

**APPEAL—Continued.****II. DECISIONS REVIEWABLE.**

2. *Arrest of Judgment.*—An order in arrest of judgment puts an end to the case in the court below, and is a disposition thereof from which an appeal will lie. *Pillsbury, etc., Co. v. Walsh*, 76, 83 (2).
3. *Questions Reviewable.—Weight of Evidence.*—Questions which go to the weight of the evidence are not reviewable on appeal where the evidence is both oral and documentary.  
*Powell v. Jackson*, 597, 606 (6).
4. *Questions Presented.—Motion for Change of Venue.*—No question was presented on alleged error in overruling a motion for change of venue, where, aside from a copy of the assignment of errors, no mention of such error was found in appellants' brief, and no motion for change of venue or ruling thereon was disclosed by the record.  
*Pottlitzer v. Citizens Trust Co.*, 45, 60 (3).
5. *Judgments Appealable.—Amount.*—Under §§1389, 1391 Burns 1914, Acts 1903 p. 280, Acts 1901 p. 565, prohibiting appeals to the Supreme or Appellate Court where the amount in controversy does not exceed fifty dollars, except where the validity of a franchise, ordinance or statute is questioned, or some constitutional right is involved, appellate jurisdiction is determined by the amount claimed by plaintiff if defendant prevailed below, and, at least in the absence of a set-off or counterclaim, by the amount of the judgment if the plaintiff prevailed; hence, where plaintiff asked for \$150 damages and recovered a judgment for \$25, the court could not entertain defendant's appeal therefrom, in the absence of any questions to bring it within the statutory exceptions.  
*Schultz v. Alter*, 245.
6. *Right of Action.—Acceptance of Allowance of Board of Commissioners.*—Where the board of commissioners allowed the claim of an assessor each year for the full number of secular days devoted to the work during the period from March 1 to May 15, and disallowed the claim for extra days and work performed on Sundays, and the record discloses that the claim sued on was filed and disallowed in its entirety, the objection that plaintiff, having accepted and retained the allowances for each year, is precluded from maintaining any action for the disallowed portions, is inapplicable.  
*Stellhorn v. Board, etc.*, 14, 24 (9).
7. *Record.—Bill of Exceptions.—Questions Reviewable.*—Under §661 Burns 1914, Acts 1911 p. 193, application for reëxtension of the time for filing a bill of exceptions shall be made on the day prior to the day the time first given expires, and there is no other authority by which a reëxtension of time beyond the term may be granted; hence an application made on the day on which the time first given expired came too late, and though granted, did not operate to make the bill of exceptions thereafter filed a part of the record, and consequently no question arising on the evidence was presented.  
*King-Crowther Corp. v. Ashcraft*, 412, 415 (3).

**III. RIGHT OF APPEAL.**

8. In order that a party may be entitled to appeal from the final action of a trial court, it must appear that he has a substantial interest in the subject-matter of the litigation, and that he is prejudiced or aggrieved substantially by the judgment or decree from which he seeks to appeal. *Ansel v. Kyger*, 259, 262 (1).
9. *Administrator.—Parties.*—The administrator of an estate is not entitled to a hearing on appeal from an order affecting his trust,

**APPEAL—Continued.**

even though the trust is prejudiced by such order, unless all whose interests are antagonistic to his interests are properly before the court.  
*Ansel v. Kyger*, 259, 262 (3).

10. *Administrator*.—Unless the estate he represents is prejudiced by a judgment or decree, the administrator as such is not authorized to appeal therefrom; hence, where one who was administrator was prejudiced in his individual capacity by an order made in the interest and for the benefit of the estate which he represented, he could not in his official capacity complain of such order and an appeal by him as administrator would not lie.

*Ansel v. Kyger*, 259, 262 (2).

11. *Amount in Controversy*.—An appeal does not lie from the judgment against plaintiff in an action originally filed before a justice of the peace for the recovery of a sum less than fifty dollars, and in which no question is involved to bring the case within the exceptions provided by §§671, 1391 Burns 1914, §632 R. S. 1881, Acts 1901 p. 565.

*Mantle Lamp Co. v. Bonich*, 275, 276 (1).

12. *Amount in Controversy*.—Where the circuit court sustains a demurrer to the complaint and, on refusal to amend, renders judgment for the defendant, in an action commenced before a justice of the peace, the amount in controversy as affecting the right to appeal is to be determined from the complaint.

*Mantle Lamp Co. v. Bonich*, 275, 276 (2).

13. *Parties.—Interest.—Appeal by Taxpayer from Judgment Ordering Local Option Election*.—Where, on dismissal by the board of county commissioners of a petition for an election upon the question of whether the sale of intoxicating liquors should be prohibited, two of the petitioners, alleging they were aggrieved, appealed to the circuit court and there procured the issuance of summons on a remonstrant who as a taxpayer had moved for and procured the dismissal of the petition by the board, and the actual litigation was carried on between him and the petitioners, while the issues joined disclosed no other parties, the remonstrant had such an interest in the judgment of the circuit court ordering the board to hold the election as to preclude a dismissal of his appeal therefrom.

*Cushman v. Hussey*, 464, 469 (2).

**IV. PRESENTATION AND RESERVATION IN LOWER COURT.****(A) ISSUES AND QUESTIONS.**

14. *Questions Reviewable.—Motion for Judgment on Interrogatories.—Record*.—Alleged error in the overruling of a motion for judgment on the jury's answers to interrogatories presents no question, where it appears from the record that such motion was not ruled on by the trial court.

*Dunton v. Howell*, 183, 186 (4).

15. *Presenting Questions for Review.—Refusal of Nunc Pro Tunc Entry*.—A motion for a new trial is not requisite in order to have a review of the action of the trial court on an application for an entry *nunc pro tunc*, but exceptions should be properly reserved and the ruling should be assigned as error.

*Pittsburgh, etc., R. Co. v. Lamm*, 409, 411 (2).

16. *Proceedings in Trial Court Pending Appeal.—Application for Nunc Pro Tunc Entry.—Denial of Relief.—Presenting Question for Review*.—Where, after the appeal from a judgment had been perfected and briefs filed, appellant petitioned the trial court for a *nunc pro tunc* entry of the filing of instructions, the relief sought

**APPEAL—Continued.**

was auxiliary to the cause pending on appeal, and the dismissal of the petition was properly brought before the court on appeal by proceeding by *certiorari* rather than by an independant appeal.

*Pittsburgh, etc., R. Co. v. Lamm*, 409, 411 (1).

17. *Questions for Review.—Arrest of Judgment.—Motion for New Trial.*—Where, on appeal from an order in arrest of judgment, the appellant has incorporated in the record appellee's motion for a new trial, filed prior to the motion in arrest, containing the assignment that the verdict is not sustained by sufficient evidence, and the appellee contends that there was a failure to prove certain essentials claimed to have been omitted from the averments of the complaint, the court on reversing the order in arrest of judgment, should determine whether the evidence is sufficient upon which to rest a judgment on the verdict.

*Pillsbury, etc., Co. v. Walsh*, 76, 94 (15).

**(B) MOTION FOR NEW TRIAL.**

18. *Questions Reviewable.—Ruling on Motion for New Trial.*—Where the evidence is not in the record, and no complaint is made as to the special finding of facts, no question is presented on the overruling of the motion for a new trial.

*Jones v. Chatfield & Woods Co.*, 265, 269 (4).

19. *Ruling on Motion for New Trial.—Briefs.*—Where appellant's brief does not contain the motion for a new trial or its substance, and discloses no application of any of the points and authorities stated to any particular ground of such motion, no question is presented on alleged error in the overruling of such motion.

*Continental Nat. Bank v. McClure*, 553, 554 (1).

20. *Questions Reviewable.—Affidavits.*—No question is presented on the ground of a motion for new trial challenging the competency of a juror, where neither the affidavits supporting such challenge, nor their substance, is set out in appellant's brief.

*Johnson v. Brady*, 556, 558 (1).

21. *Presenting Questions for Review.—Grounds.*—Separate objections to each special finding of fact on the ground that the same was not sustained by sufficient evidence and was contrary to law, set out in the motion as grounds for a new trial, though usually and properly to be assigned under the statutory forms that "the decision of the court is not sustained by sufficient evidence" and that "the decision of the court is contrary to law", sufficiently complied with the statute so as to present the questions sought to be presented.

*Donlon v. Maley*, 25, 30 (6).

22. *Review.—Misconduct.—Surprise.—Variance.*—In an action by a terminal carrier to recover freight charges on a car of horses, where defendant filed a counterclaim for damages counting on plaintiff's common-law liability, and in which no reference was made to any special contract of shipment, the statement of defendant in response to a question from his counsel on cross-examination that the initial carrier gave him a way-bill or shipping contract, that the shipment was billed through to final destination, and that the way-bill or contract was at his home, did not constitute either misconduct, surprise, or variance that would entitle plaintiff to a new trial, in view of the fact that no such contract was introduced or offered in evidence, and that there was nothing to show that plaintiff was a party to such contract or in any way entitled to the benefit of any of its provisions.

*Nashville, etc., R. Co. v. Johnson*, 416, 431 (10).

**APPEAL—Continued.****V. PARTIES.**

23. *Record.—Right to Allege Error.*—The overruling of motions to set aside an order of distribution in a receivership case, made by persons affirmatively shown to have been strangers to the record is not available on appeal.

*Pottlitzer v. Citizens Trust Co.*, 45, 62 (7).

**VI. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.****(A) TIME OF TAKING PROCEEDINGS.**

24. *Imperfect Term Time Appeal.—Vacation Appeal.—Parties.*—An attempted term time appeal, not perfected as such, could not be treated as a vacation appeal where there was no judgment below in favor of one of the parties named as an appellee.

*Gates v. Weyenberg*, 241, 244 (2).

25. *Perfection of Appeal.—Filing Transcript.*—An attempted term time appeal is not perfected as such where the transcript is not filed in the court on appeal within the time allowed by §679 Burns 1914, §638 R. S. 1881.

*Gates v. Weyenberg*, 241, 243 (1).

**(B) COSTS.**

26. *Docket Fees.—“Submission”.*—Section 9389 Burns 1914, Acts 1907 p. 92, providing for the taxation of a docket fee against the losing party as a part of the costs on appeal, except in the event the cause is dismissed by appellant before submission to the court, discloses no legislative intent that the exception was intended to apply in all cases where the cause was dismissed before distribution for decision, since the word “submission” as applied to causes pending on appeal has a well understood meaning and the time for submission is expressly fixed by §693 Burns 1914, Acts 1885 p. 219, while no time certain is fixed for the distribution.

*Smith v. Smith*, 263, 264 (2).

27. *Motion to Retax.—Notice.*—Where a motion was filed to retax the costs with respect to docket fees taxed on appeal, the notice of the motion was properly served on the Attorney-General, under §9269 Burns 1914, Acts 1899 p. 124, since such fees are taxed for the benefit of the State.

*Smith v. Smith*, 263, 264 (1).

**VII. ASSIGNMENT OF ERRORS.**

28. *Matters Assignable.*—That the evidence is not sufficient is not the subject of an independent assignment of error on appeal.

*Graham v. Henderson Elevator Co.*, 697, 699 (3).

29. *Sufficiency.*—Assignments of error dealing with abstract propositions of law, questions of fact and argument, present nothing for review.

*Graham v. Henderson Elevator Co.*, 697, 699 (2).

30. *Waiver.*—An assignment of error not discussed by appellant is waived.

*Buckeye, etc., Co. v. Stewart-Carey, etc., Co.*, 302, 310 (5).

31. *Waiver.*—Assignments of error are waived by appellants' failure to comply with Rule 22, clause 5, requiring appellants to set out in the brief each separate error relied on under “points and authorities.”

*Hinton v. Falls City, etc., Loan Assn.*, 470, 473 (1).

32. *Questions Presented.*—No question is presented by assigning as independent error matter that should have been presented to the trial court by motion for a new trial.

*Hinton v. Falls City, etc., Loan Assn.*, 470, 474 (3).



**APPEAL—Continued.**

33. *Questions Presented.*—No question is presented on an assignment of error challenging a conclusion of law by points in appellant's brief directed to the sufficiency of the evidence.  
*Hinton v. Falls City, etc., Loan Assn.*, 470, 474 (2).
34. *Review.*—Reversal can not be predicated on an assignment of error in sustaining a demurrer to a second paragraph of answer, where the only second paragraph of answer appearing in the record was addressed to the original complaint and filed prior to the filing of an amended complaint.  
*Jones v. Chatfield & Woods Co.*, 265, 268 (3).
35. *Sufficiency of Complaint.*—An assignment of error that the complaint does not state facts sufficient to constitute a cause of action, presents no question on appeal in a cause commenced after the act of 1911 (Acts 1911 p. 415, §344 Burns 1914), relating to civil procedure went into effect.  
*National Motor, etc., Co. v. Pake*, 366, 368 (1).
36. *Conflict With Record.*—No question is presented by the assignment that the court erred in refusing to hear and consider the intervening petitions of appellants, where the record does not show such a refusal, but shows that no such petitions had been properly filed in the court.  
*Pottlitzer v. Citizens Trust Co.*, 45, 62 (8).
37. *Amendment.*—Leave to amend the assignment of errors may be granted for the purpose of presenting for review the striking out of a petition for a *nunc pro tunc* entry filed in the trial court after the appeal was perfected and briefs filed.  
*Pittsburgh, etc., R. Co. v. Lamm*, 409, 411 (3).
38. *Briefs.*—No question is presented on alleged error in permitting a reply to stand by a brief which contains neither the reply, nor answer, nor complaint, but merely a meager statement as to the general character of the complaint and answer.  
*Schaefer v. Keokuk Savings Bank*, 474, 475 (2).
39. *Transcript.—Failure to Comply With Rules.*—Where, in the preparation of the transcript, appellant has not complied with that part of Rule 3, specifying that where the evidence is set out, the name of each witness and whether the examination is direct, cross or redirect shall be stated in the margin of every page, the court must disregard the assignment of error in the overruling of the motion for a new trial in so far as questions arising on the evidence are concerned.  
*Buckeye, etc., Co. v. Stewart-Carey, etc., Co.*, 302, 310 (3).

**VIII. BRIEFS.**

40. *Briefs on Petition for Rehearing.—Consideration.*—Extracts of testimony set out in appellant's brief on petition for a rehearing, not set out or referred to in appellant's original brief, will not be considered.  
*Nashville, etc., R. Co. v. Johnson*, 416, 434 (13).
41. *Insufficient Briefs.—Dismissal.*—Where a number of errors were assigned, appellant's brief, which under "points and authorities" contained a number of general propositions that might have been applicable to one or more of the rulings assigned as error, without any reference or effort to apply such propositions to any error assigned, was insufficient under clause 5 of Rule 22 to present any question, and necessitated a dismissal.  
*Palmer v. Beall*, 208.
42. *Presenting Error.—Burden.*—It devolves on appellants to present to the court the error relied on substantially as required by the rules of the court.  
*Rook v. Straus Bros. Co.*, 381, 382 (1).

**APPEAL—Continued.**

43. *Questions Presented.*—No question is presented on the overruling of a motion for new trial for alleged error in instructions where appellant's brief contains no proposition addressed to the giving or refusal of instructions. *Powell v. Jackson*, 597, 606 (5).
44. *Questions Presented.*—Nothing is presented for consideration on a question sought to be raised where the points and authorities in appellant's brief are not applied to any specific error assigned. *Schaefer v. Keokuk Savings Bank*, 474, 475 (1).
45. *Questions Presented.—Ruling on Demurrer.*—No question is presented by an assignment of error in overruling a demurrer, where neither the pleading, to which the demurrer was addressed, nor its substance is set out in appellant's brief. *Buckeye, etc., Co. v. Stewart-Carey, etc., Co.*, 302, 310 (2).
46. *Presenting Questions for Review.—Motion for New Trial.*—No question arising on the motion for a new trial is presented for review on appeal, where neither the motion nor its substance is set out in appellants' brief in compliance with Rule 22, clause 5, and the defect has not been cured by appellees' brief. *Harrold v. Whistler*, 504, 506 (2), 507 (2).
47. *Rules of Court.—Effect.*—The rules of the court on appeal are binding upon it as well as upon the litigants, and there must be a substantial compliance therewith before the court can assume to pass on the merits of an appeal. *Rook v. Straus Bros. Co.*, 381, 383 (3).
48. *Sufficiency.*—Where appellant's brief contained a number of abstract propositions of law without directing them to any specific error relied on, it was insufficient to present any question. *Harrold v. Whistler*, 504, 507 (4).
49. *Sufficiency.*—To constitute a sufficient compliance with Rule 22, briefs must be so prepared that all questions presented by the assignment of errors and relied on for reversal can be determined from an examination of the briefs without looking at the record. *Harrold v. Whistler*, 504, 506 (3).
50. *Sufficiency.*—Though appellant's brief does not set out the evidence in narrative form in strict compliance with Rule 22, clause 5, it will be sufficient to present the question of the sufficiency of the evidence, where it appears that there is a substantial compliance and a good-faith effort at full compliance with such rule. *Johnson v. Brady*, 556, 558 (2).
51. *Waiver of Error.*—Questions arising on alleged error and not referred to under points and authorities in appellant's brief are waived. *Graham v. Henderson Elevator Co.*, 697, 699 (4).
52. *Waiver of Error.*—An alleged error must be regarded as waived where appellant's brief contains no proposition or point directed thereto. *Buckeye, etc., Co. v. Stewart-Carey, etc., Co.*, 302, 309 (1).
53. *Waiver of Error.*—Error, if any, in the overruling of a motion for a new trial is waived as to one of the defendants in whose favor the judgment was rendered, where appellant's brief, under "points and authorities" presents no question as to the decision of the trial court in favor of such defendant. *Standard Brewery v. Lacanski*, 499, 500 (1).

**IX. REVIEW.****(A) AS TO EVIDENCE.**

54. The court on appeal will not determine the preponderance of the evidence, and if there is proper evidence on which the verdict may rest, it will not be reviewed. *Cincinnati Gas, etc., Co. v. Underwood*, 351, 355 (2).

**APPEAL—Continued.**

55. *Conclusiveness of Decision.*—Though the evidence is conflicting, the decision of the trial court can not be disturbed if there was some evidence to support it. *Fuhrman v. Frech*, 349, 351 (2).
56. *Conclusiveness of Decision.*—Where the evidence relied on by plaintiff as constituting an estoppel *in pais* against one of the defendants was conflicting, the decision of the trial court thereon was conclusive. *Standard Brewery v. Lacanski*, 499, 502 (3).
57. *Record.—Instructions.*—Where the evidence is not in the record, the instructions will not be held erroneous if they were applicable to any possible state of the evidence under the issues. *Goodman v. Bauer*, 671, 672 (1).
58. *Invited Error.—Admission of Evidence.*—Nothing is presented by the alleged erroneous admission of evidence, where the record shows that the objectionable evidence was introduced by appellant rather than by appellee. *Buckeye, etc., Co. v. Stewart-Carey, etc., Co.*, 302, 310 (4).
59. *Admission of Evidence.*—In an action on notes, the admission in evidence of a note executed by one of the defendants and not involved in the litigation was not erroneous, where the record shows that such defendant admitted his signature thereto and that it was offered in evidence as a part of his cross-examination after he had offered a number of instruments signed by him in support of his plea of *non est factum*. *Roach v. Cumberland Bank*, 547, 550 (3).
60. *Questions Presented.—Objections to Evidence.—Briefs.*—No question is presented on the admission of evidence where appellant's brief does not disclose what, if any, objection was made to its admission. *Roach v. Cumberland Bank*, 547, 552 (6).
61. *Questions Reviewable.—Objections to Evidence.*—An objection to evidence on the ground that it is not competent or relevant is too general and indefinite to present any error on the admission of such evidence. *Roach v. Cumberland Bank*, 547, 551 (4).
62. *Questions Presented.—Weight and Sufficiency.*—Alleged error based on the insufficiency of the evidence presents the question of whether there is any evidence to support the verdict in every essential, and, though the evidence may be unsatisfactory, it presents no question of law calling for a reversal. *Public Utilities Co. v. Cosby*, 252, 258 (5).
63. *Questions Reviewable.—Objections to Evidence.*—No question is presented for review on alleged erroneous admission of evidence where it appears that no objection was interposed to the question put to the witness until after the answer was begun, that none was made after the answer was completed, and that there was no motion to strike out the answer or any part of it. *Marietta Glass Mfg. Co. v. Bennett*, 435, 452 (16).
64. *Weight.*—The court on appeal will not weigh the evidence for the purpose of determining upon which side of a case the greater weight lies. *J. F. Darmody Co. v. Reed*, 662, 666 (2).
65. *Weight and Sufficiency.*—The court can not weigh the evidence on appeal, so that where the evidence is conflicting and susceptible to more than one inference the judgment of the trial court will not be disturbed. *Nicholson v. Smith*, 385.
66. *Sufficiency.*—The evidence is sufficient to sustain the decision of the trial court in favor of plaintiff where it appears that there was some evidence supporting every material allegation of the complaint. *Ward v. Perry*, 1, 7, (6).

**APPEAL—Continued.**

67. *Natural Laws.*—Appellant's contention that the decision could not be sustained because it is against natural law that a man 67 years of age, weighing 175 pounds, would be physically able to throw a man 64 years of age and weighing 165 pounds, seven feet, could not be sustained even if the evidence disclosed such state of facts, and especially not in view of the versions of the transaction as disclosed by the record. *Peterson v. Liddington*, 41, 43 (1).
68. *Objections to Evidence.—Waiver.*—Where the amount of the damages was not questioned by the motion for a new trial, questions presented on the admission and exclusion of evidence relating solely to the question of damages were waived. *Maywood Stock, etc., Co. v. Pratt*, 131, 139 (3).
69. *Objections to Evidence.*—Reversible error can not be predicated on the admission of evidence over an objection which may be obviated by further evidence, where counsel offering same agree to supply such further evidence and thereafter fail to do so, unless such failure is followed by the objector's motion to strike out the evidence so admitted. *Roach v. Cumberland Bank*, 547, 551 (5).
70. *Presumptions.*—Where plaintiff, suing to recover a balance claimed to be due for services performed on Sundays in the assessment of property for taxation, testified that he had been paid for sixty days' work, while he was in fact paid in full for sixty-five working days intervening from March 1 to May 15, inclusive, it will be presumed in considering his testimony that he erroneously said sixty instead of sixty-five. *Stellhorn v. Board, etc.*, 14, 19 (2).
71. *Verdict.*—Where the questions involved were disputed questions of fact, and there was evidence to sustain each allegation of the complaint, the verdict for plaintiff must be treated as conclusive, since the court on appeal can not weigh the evidence. *Dunton v. Howell*, 183, 185 (1).
72. *Verdict.*—The verdict for plaintiff was conclusive on evidence which followed the allegations of the complaint, notwithstanding such evidence was conflicting or confusing in some respects, since the court on appeal can not weigh the evidence. *Public Utilities Co. v. Cosby*, 252, 258 (6).
73. *Verdict.*—Where there was some evidence to support the verdict and to warrant the inference of every ultimate fact essential to support the verdict, the verdict can not be disturbed on the ground that the evidence is insufficient, or that the verdict is contrary to law. *American Steel, etc., Co. v. Carbone*, 484, 495 (8).
74. *Verdict.*—Where defendant's counterclaim proceeded on the theory of damages to his horses while being transported by the plaintiff railroad company, and the evidence was directed to that end, without any evidence on the subject of damages to any other horses, the verdict is not open to the objection that it includes damages for the loss of two other horses. *Nashville, etc., R. Co. v. Johnson*, 416, 434 (12).
75. *Admissibility.*—In an action for fraud in the sale of a stallion, where a witness was asked if he could state why mares were not bred after a certain time, to which appellant objected on the ground that the question called for a conclusion and was hearsay, and the court, before the witness answered, cautioned him that he might state why they were not bred, but not what was said, the admission of the answer of the witness that the horse "was sore and they could not breed to him," was not error, since, in the absence of any objection on the ground that he had not stated any facts or observations on which to base an opinion, or from which he might draw a

**APPEAL—Continued.**

conclusion, it must be assumed that the witness had stated some facts as a basis for the answer given.

*Maywood Stock, etc., Co. v. Pratt*, 131, 138 (2).

**(B) AS TO INSTRUCTIONS.**

76. Where the instructions are not in the record by bill of exceptions, and there is nothing to show that they were filed as required by the statute to authorize the bringing of same into the record by other methods, no question can be considered from the standpoint of such instructions.

*Peterson v. Liddington*, 41, 44 (3).

77. In an action on a policy of insurance where the question of the construction of the contract was solely for the court, as was also the question of whether defendant had made a timely rescission of the contract, the court erred in instructing the jury that it should determine the facts and say whether such facts showed a disaffirmance within a reasonable time, as well as in giving instructions that were outside the issues and misleading.

*Supreme Lodge, etc. v. Miller*, 269, 274 (5).

78. In an action for fraud in the sale of a horse, an instruction that if appellant's agent who made the sale to appellee represented the horse to be sound, such statement "would imply that said agent knew that said horse at said time, and that he was speaking from his own knowledge", etc., was not indefinite or uncertain and did not invade the province of the jury, though omitting the words "was sound" or words of like import after the words "at said time", where the rest of the instruction made its meaning clear, and, when considered with the other instructions, substantially stated the law correctly.

*Maywood Stock, etc., Co. v. Pratt*, 131, 141 (6).

79. *Consideration of Instructions.*—The instructions given by a trial court are to be construed in their entirety, and, when thus considered, if it appears that the jury was fully instructed on the issues, errors appearing on a consideration of the instructions in detached portions will be disregarded.

*Cullman v. Terre Haute, etc., Traction Co.*, 187, 190 (2).

80. *Duty to Request.*—In a wife's action for personal injuries, where the complaint alleged that plaintiff was employed by an electrical firm, and there was no evidence as to loss of wages except as to wages earned in such employment, defendant should have requested an instruction advising the jury that plaintiff could not recover for loss of time or services belonging to her husband, if such was deemed necessary for the protection of its interests.

*P. B. Arnold Co. v. Buchanan*, 626, 634 (6).

81. *Evidence.*—Where the complaint was sufficient to invoke the last clear chance doctrine, and the evidence was not in the record, the court on appeal could not hold an instruction on that doctrine erroneous, though perhaps it was subject to criticism, since the evidence may have clearly established the propositions claimed by appellant to have been omitted from such instruction.

*Goodman v. Bauer*, 671, 673 (4).

82. *Harmless Error.* — "Approximately". — "Proximately". — The words "approximately" and "proximately" are so nearly synonymous that the use of the word "approximately" in an instruction instead of the word "proximately", did not render the instruction fatally defective.

*P. B. Arnold Co. v. Buchanan*, 626, 634 (7).

83. *Presumptions.*—*Burden.*—The giving of instructions not applicable to the case made by the pleadings will be presumed to have



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- been harmful error, and after such error is pointed out the burden is upon appellee to show by the record that the error was harmless.  
*National Motor, etc., Co. v. Pake*, 366, 372 (5).
84. *Refusal of Instructions.*—There is no error in the refusal of instructions shown to have been covered by the instructions given.  
*Marietta Glass Mfg. Co. v. Bennett*, 435, 451 (14).
85. *Refusal of Instructions.*—The refusal of requested instructions was not error where they were fully covered by instructions given.  
*J. F. Darmody Co. v. Reed*, 662, 668 (8).
86. *Refusal of Instructions.*—There is no error in the refusal of an instruction which, in so far as it was correct, was fully covered by instructions given.  
*P. B. Arnold Co. v. Buchanan*, 626, 635 (8).
87. *Refusal of Instructions.*—There is no error in the refusal of instructions where those given fully and correctly state the law applicable to the issues and facts of the case.  
*Maywood Stock, etc., Co. v. Pratt*, 131, 145 (11).
88. *Refusal of Instructions.*—There is no reversible error in the refusal of instructions, where every element of the case is shown to have been fully covered and properly presented by the instructions given.  
*Lake Shore, etc., R. Co. v. W. H. McIntyre Co.*, 191, 206 (9).
89. *Refusal of Instructions.*—Reversible error can not be predicated on the refusal of instructions on the subject of wilful injury, where the finding was in appellant's favor on that theory of the case, nor in the refusal of instructions that were fully covered by the instructions given.  
*Pennsylvania Co. v. Reesor*, 636, 654 (17).
90. *Refusal of Peremptory Instruction.*—In an action for fraud in the sale of a horse the court properly refused to direct a verdict for defendant, in view of the admission of defendant's agent that he made the statement attributed to him without personal knowledge of its truth, and of other evidence of similar import.  
*Maywood Stock, etc., Co. v. Pratt*, 131, 143 (8).
91. *Refusal of Instructions.*—In an action for fraud in the sale of a horse, the refusal of an instruction to the effect that a mere expression of opinion does not amount to a representation was not error, where the court stated in another instruction that a representation to be fraudulent must not be a mere expression of opinion or relate to facts "open to plaintiff as well as to defendant."  
*Maywood Stock, etc., Co. v. Pratt*, 131, 143 (9).
92. *Refusal of Instructions.*—Where the court gave an instruction in lieu of and which fully covered a requested instruction upon the subject of plaintiff's burden to prove the material allegations of the complaint by a preponderance of the evidence, there was no error, although the instruction given had coupled with it a definition of preponderance of evidence, and a statement as to where the burden lies.  
*J. F. Darmody Co. v. Reed*, 662, 668 (6).
93. *Refusal of Instructions.*—In an action for fraud in the sale of a horse, where there was evidence to show that the one who made the alleged false representations was in the employ of defendant and had authority to make the sale, and the representations related to matter peculiarly within the knowledge of defendant and its agent, and of which the plaintiff could not know and concerning which he made inquiry, the court properly refused an instruction requested by defendant on the theory that a purchaser has no right to rely upon representations where he has reasonable opportunity of examining the property and judging for himself as to its qualities.  
*Maywood Stock, etc., Co. v. Pratt*, 131, 144 (10).

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94. *Record.—Filing Instructions.*—To make the instructions a part of the record under §561 Burns 1914, Acts 1907 p. 652, the record must not only show an order of filing the instructions, but that they were in fact filed. *Roach v. Cumberland Bank*, 547, 550 (2).
95. *Record.*—Under §§559, 560 Burns 1914, §§534, 535 R. S. 1881, exceptions to instructions to be effective must be dated preceding the return of the verdict, and under §561 Burns 1914, Acts 1907 p. 652, the exceptions, if taken orally, must be noted on the minutes of the court and appear in the transcript on appeal, while, if taken in writing, the memorandum must be dated and signed by the party or his counsel; hence, where the record disclosed that neither of such methods was followed in taking the exceptions, and no attempt was made to bring the instructions into the record by bill of exceptions, no question was presented on the giving of such instructions. *Roach v. Cumberland Bank*, 547, 549 (1).
96. *Record.*—Notwithstanding the memorandum placed by the trial court at the close of the instructions was dated April 9, and the record entry showed that on April 10 the instructions were read to the jury to the reading of which oral exceptions were at the time reserved, that all the instructions were signed by the court, filed with the clerk and ordered made a part of the record, etc., the instructions were a part of the record under §561 Burns 1914, Acts 1907 p. 562; the fact that they were signed by the court before they were read to the jury being immaterial. *Deer v. Suckow Co.*, 277, 279 (1).

**(C) AS TO PLEADINGS.**

97. *Amended Complaint.—Exceptions to Ruling on Demurrer to Original.*—Where appellant's demurrer to the complaint was overruled, the subsequent filing of an amended complaint took out of the record the exceptions reserved on the overruling of the demurrer to the original complaint. *Jones v. Chatfield & Woods Co.*, 265, 268 (2).
98. *Amendments Regarded Made.*—Where a complaint to enjoin interference with an easement for a pipe line over the land of defendants and into a lake failed to describe the shape, dimensions or position of the easement, or a request by plaintiff for the location of the way and a refusal by defendants to grant it, and defendants by both their answer and cross-complaint alleged ownership of the real estate between the lake shore and plaintiff's premises, specifically describing same, and further alleged that defendants indicated and pointed out the site, place and location for the proposed easement and right of way for such pipe line, that the same was in a convenient place, extending in a straight line from plaintiff's plant in a northerly direction to the lake, at a point and position west and westerly from certain piers, docks and harbor, that the location pointed out was reasonable, and that plaintiff had no rights at the place where it was attempting to construct its line, etc., and it appears that the question of the location of the easement was tried on evidence introduced by both parties without objection, and that the issue was fully tried and determined, the defects in the complaint, being such as could have been amended at any time under §405 Burns 1914, §396 R. S. 1881, will be deemed, under §700 Burns 1914, §658 R. S. 1881, to have been amended so as to preclude a reversal. *Shedd v. American Maize, etc., Co.*, 146, 160 (11).
99. *Exceptions to Conclusions of Law.—Admissions.—Sufficiency of Complaint.*—While an exception to conclusions of law admits for the purpose of the exception that the facts within the issues have been fully and correctly found, it does not always render a con-



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sideration of the complaint unnecessary, and it is only where the facts are fully and correctly found within the issues that an exception to the conclusions of law presents the same question as a demurrer to the complaint for want of facts.

*Shedd v. American Maize, etc., Co.*, 146, 159 (10).

100. *Questions Reviewable.—Demurrer to Reply.*—No question can be presented on the overruling of a demurrer challenging the sufficiency of an affirmative paragraph of reply, where such demurrer is not accompanied by a memorandum of defects as required by §344 Burns 1914, Acts 1911 p. 415.

*Dunton v. Howell*, 183, 186 (5).

101. *Questions Reviewable.—Sufficiency of Complaint.*—Under §§344, 348 Burns 1914, Acts 1911 p. 415, relating to procedure in civil cases, no question can be presented on appeal with reference to the sufficiency of a complaint, where the demurrer thereto is not accompanied by a memorandum of defects.

*American Steel, etc., Co. v. Carbone*, 484, 487 (1).

102. *Questions Presented.—Findings and Conclusions of Law.—Sufficiency of Pleading.*—The sufficiency of pleadings assailed will not be given independent consideration on appeal where the same questions must be determined on consideration of the special finding of facts and conclusions of law.

*Tuell v. Homann*, 285, 288 (2).

103. *Ruling on Demurrer.*—In an action against a railroad company for conversion by reason of the wrongful delivery of an automobile truck, where defendant's answers alleging matter in justification were probably insufficient as against a demurrer properly addressed thereto, the court did not err in overruling the demurrer to a reply to such answers, even though such reply was not a model pleading, where it contained sufficient averments to avoid the material allegations of such answers.

*Lake Shore, etc., R. Co. v. W. H. McIntyre Co.*, 191, 197 (1).

104. *Ruling on Demurrer.*—By demurring to appellees' cross-complaint and to the third, fourth and fifth paragraphs of answer, appellant, for the purposes of the demurrers, admitted the truth of the facts well pleaded in each of such pleadings, so that on the overruling of such demurrers appellant's refusal to plead further necessitated the pronouncing of judgment on the facts pleaded, and, even though the court erred in sustaining the demurrer to the fourth and fifth paragraphs of answer, such judgment must stand, in view of the sufficiency of the cross-complaint and of the third paragraph of answer to withstand the demurrers addressed to them.

*Williams v. Wood*, 69, 73 (1).

105. *Ruling on Demurrer.—Constitutional Questions.—Transfer.*—Where charges instituted to revoke a druggist's license were demurred to for want of sufficient facts and also upon the ground that the statute under which the proceeding was instituted was unconstitutional and void, the error assigned on the sustaining of such demurrer necessitated the transfer of the appeal to the Supreme Court on the theory that a constitutional question was involved, although the latter ground stated is not recognized as ground for demurrer, since the trial court may have treated it as a part of the memorandum pointing out wherein the charges were insufficient for want of facts, and especially in view of the rule that the court on appeal will search the record to uphold the sustaining of the demurrer on any sufficient ground though not contained in the memorandum of defects.

*Indiana Board, etc., v. Haag*, 218.

- 105a. *Constitutional Questions.—Transfer.*—Where the record discloses that a constitutional question is involved in an appeal to the

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Appellate Court, and such question is duly presented by the briefs, a transfer of the cause to the Supreme Court is required.

*American Maize, etc., Co. v. Shedd*, 709.

**(D) PRESUMPTIONS.**

106. Where the instructions are not before the court on appeal, it will be presumed that the trial court performed its duty in that respect.

*Vandalia R. Co. v. Duling*, 332, 347 (3).

107. *Burden to Show Error*.—On appeal every presumption is indulged in favor of the correctness of the judgment of the trial court and the burden is on appellant to show prejudicial error.

*Peterson v. Liddington*, 41, 43 (2).

108. *Burden to Show Error*.—Every presumption is indulged in favor of the correctness of the rulings of the trial court, and appellant has the burden to show affirmatively by the record the error of which he complains.

*Goodman v. Bauer*, 671, 672 (2).

**(E) VERDICT, FINDINGS AND ANSWERS TO INTERROGATORIES.**

109. *Decision.—Inferences*.—In support of the findings, it is the duty of the court on appeal to indulge all inferences that may be reasonably deduced from the evidence.

*Kixmiller v. Baltimore, etc., R. Co.*, 686, 695 (6).

110. *Evidence to Support*.—A verdict will not be upheld which must rest on mere conjecture or speculation.

*Johnson v. Brady*, 556, 566 (7).

111. *Verdict.—Conclusiveness*.—Where there is some evidence to support each of the material facts on which the verdict rests, the verdict will not be disturbed on the ground of insufficiency of evidence.

*Marietta Glass Mfg. Co. v. Bennett*, 435, 452 (15).

112. *Verdict*.—In an action on a number of notes, a verdict for plaintiff can not be disturbed as not supported by the evidence or as being contrary to law, where there was evidence to show that appellant executed one of the notes sued on, and the amount of the verdict is consistent with a recovery on such note.

*Roach v. Cumberland Bank*, 547, 552 (7)

113. *Verdict.—Conclusiveness*.—Where the issue of negligence in the killing of certain animals while the same were trespassing upon defendant's railroad tracks was properly raised, and there was evidence to show knowledge by defendant's engineer of their presence upon the tracks, together with other evidence making the question of negligence properly one of fact for the jury, its verdict for plaintiff was sustained by sufficient evidence.

*Vandalia R. Co. v. Duling*, 332, 347 (4).

114. *Findings.—Conclusiveness*.—In support of the finding of the trial court, attacked on the ground of insufficient evidence, only the evidence, and inferences therefrom, tending to support the finding can be considered, and the finding thus warranted is conclusive.

*Stellhorn v. Board, etc.*, 14, 24 (8).

115. *Special Findings.—Inferences*.—As a general rule evidentiary matter in a special finding will be disregarded, and nothing can be added by presumption, inference or intendment, while silence upon a material point is equivalent to a finding against the party having the burden of proof, but where primary facts found lead to but one conclusion the ultimate fact need not be stated and will be considered as proven.

*Spade v. Hawkins*, 388, 392 (3).

116. *Refusal of Interrogatories to Jury*.—There was no error in refusing to submit certain interrogatories to the jury, where the

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findings in answer to interrogatories submitted covered all the elements in the case as well as all the essential elements of the interrogatories refused. *Pennsylvania Co. v. Reesor*, 636, 649 (11).

117. *Answers to Interrogatories*.—In passing upon the sufficiency of the jury's answers to interrogatories to overcome the general verdict, the court will indulge all presumptions in favor of the general verdict and bring to its aid any evidence that could have been properly admitted under the issues.

*American Steel, etc., Co. v. Carbone*, 484, 491 (4).

118. *Answers to Interrogatories*.—"Wilfully".—"Intentionally".—"Or".—An interrogatory submitted to the jury in a personal injury case asking whether the engineer in charge of defendant's train "wilfully or intentionally" ran the engine upon decedent, to which the jury answered "yes", can not be considered in determining whether a verdict for plaintiff on the theory of negligence is overcome by the answers to interrogatories, since "wilfully" and "intentionally" are not synonymous, and an injury may result from intentional misconduct without containing the element of wilfulness, and the word "or" is a disjunctive conjunction coördinating words or clauses each of which in turn is regarded as excluding consideration of the other or others; while on the other hand, regarding the words as synonymous, the question calls for a conclusion of law.

*Pennsylvania Co. v. Reesor*, 636, 643 (4).

**(F) HARMLESS ERROR.**

119. Where it appears that the right result has been attained any intervening error will be deemed harmless.

*Bliss v. Gallagher*, 454, 463 (7).

120. *Admission of Evidence*.—In an action for the death of one who was run down by defendant's train while he was walking upon the tracks, in which decedent's want of due care was conceded, the admission of evidence to show that the track at the point where decedent was killed had been used for a number of years by many people as a thoroughfare was not prejudicial error.

*Pennsylvania Co. v. Reesor*, 636, 647 (7).

121. *Incomplete Instruction*.—The omission of proper matter from an instruction given is harmless where other instructions cover the matter alleged to be omitted.

*Cullman v. Terre Haute, etc., Traction Co.*, 187, 191 (4).

122. *Instructions*.—There was no prejudicial error in the giving of instructions upon the theory of a wilful injury, where the verdict was expressly upon a paragraph of complaint based on negligence.

*Pennsylvania Co. v. Reesor*, 636, 654 (16).

123. *Instructions*.—Error, if any, in an instruction relating to the furnishing of appliances to a servant for handling glass, was harmless in view of the jury's answers to interrogatories showing that it was not the duty of the employer to furnish such appliances.

*Marietta Glass Mfg. Co. v. Bennett*, 435, 450 (12).

124. *Instructions*.—Error in instructions which predicated liability against a terminal carrier for damage to a shipment of horses in part on injuries that may have been inflicted by the initial or connecting carriers, was harmless in view of evidence showing without contradiction that the horses were injured while in possession of the terminal carrier.

*Nashville, etc., R. Co. v. Johnson*, 416, 428 (7).

125. *Ruling on Demurrers*.—Error, if any, in sustaining a demurrer to a paragraph of reply and the demurrer to plaintiff's answer to

**APPEAL—Continued.**

defendant's counterclaim was harmless, where the facts pleaded were in each case provable under the general denial.

*Nashville, etc., R. Co. v. Johnson*, 416, 422 (3).

126. *Ruling on Demurrer.*—Where the subject-matter of appellant's fourth paragraph of answer included the field covered by the third paragraph, imposed no additional burden on appellant than was imposed by the third paragraph, and all proof admissible under the third paragraph was also admissible under the fourth, there was no error in sustaining a demurrer to such third paragraph.

*Lemcke v. Hendrickson*, 323, 325 (1).

**(G) ERROR WAIVED.**

127. *Briefs.—Waiver of Error.*—Alleged error in the giving and refusing of instructions is waived where no complaint with reference thereto is made in appellant's brief under the points and authorities.

*Dunton v. Howell*, 183, 186 (2).

128. *Briefs.—Waiver of Error.*—Where appellants' brief wholly failed to comply with the requirements of clause 5 of Rule 22, with reference to setting out points and authorities, and there was no effort to amend after the defect had been pointed out by appellee's brief, the errors alleged must be treated as waived.

*Rook v. Straus Bros. Co.*, 381, 383 (2).

**X. DETERMINATION AND DISPOSITION OF CAUSE.**

129. *Review.—Intervening Errors.*—Intervening errors, if any, need not be considered where a correct result has been attained in the trial court.

*Van Sant v. Wentworth*, 591, 592 (1).

130. *Review.—Questions of Fact.*—Alleged error in the overruling of appellants' motions to set aside the order of distribution made in a receivership matter can not work a reversal, where the record discloses that such motions were met by the receiver's verified answer and that evidence was heard, on which the court found that the answer was true, and that appellants had at no time filed their claim with the court or receiver.

*Pottlitzer v. Citizens Trust Co.*, 45, 61 (6).

**APPOINTMENT—**

Of special judges, see JUDGES 1, 2.

**“APPROXIMATELY”—**

See WORDS AND PHRASES.

**ARREST OF JUDGMENT—**

See APPEAL 2, 17; JUDGMENT 1-3.

Attack by motion in, see PLEADING 7, 9, 10.

Sufficiency of complaint on motion in, see SALES 9.

**ASSAULT AND BATTERY—**

*Damages.—Excessive Damages.*—A verdict for \$3,000 damages for an assault and battery on plaintiff, who was at the time an able-bodied man 64 years of age, with an earning capacity of \$4 to \$6 per day, was not such as to enable the court to reverse on the ground of excessive damages, where it appeared that plaintiff's leg was broken, and the extent and character of his other injuries were controverted questions under the evidence. *Peterson v. Liddington*, 41, 44 (4).

**ASSESSMENT—**

Of property, see TAXATION 1-3.

**ASSIGNMENT OF ERRORS—**

See APPEAL 28-39.

**ASSUMPTION OF RISK—**

See CARRIERS 19; MASTER AND SERVANT 1-5, 7-19, 33.

**“AT ONCE”—**

See WORDS AND PHRASES.

**AUTOMOBILES—**

See NEGLIGENCE 2.

**BANKS AND BANKING—**

*Deposits.—Trust Funds.—Restoring to Beneficiary.*—The act of a depositor in depositing a trust fund to his own account does not change the character of such fund, and notwithstanding the fact that it has been converted or mixed with the funds of the trustee, or of those claiming through him, if it has not passed into the hands of the parties for value without notice of the trust, and its identity has not been lost, the court will separate same from the other funds with which it has been mingled and restore same to the beneficiary entitled thereto.

*Continental Nat. Bank v. McClure*, 553, 555 (2).

**BILL OF EXCEPTIONS—**

See EXCEPTIONS, BILL OF,

**BOARD OF COMMISSIONERS—**

See COUNTIES 1, 2.

Action of, in dismissing petition for an election under the Proctor Law is a judicial act from which an appeal will lie, see INTOXICATING LIQUORS.

**BREACH—**

See DEEDS 2.

Of conditions, see DEEDS 6, 7.

Of contract, see SALES 1, 3-11.

Of trust, see LIMITATION OF ACTIONS 2.

Of warranty, see INSURANCE 2-5.

**BRIEFS—**

See APPEAL 19, 38, 60, 127, 128.

**BURDEN OF PROOF—**

See CARRIERS 21; EJECTMENT 1, 6; MASTER AND SERVANT 12; RAILROADS 1.

**CANCELLATION OF INSTRUMENTS—**

1. *Deed Given for Support.—Demand for Performance.—Necessity.*—Where a grantor conveyed to a husband and wife on condition subsequent for the care and support of grantor, and the condition was thereafter rendered impossible of performance by the death of one of the grantees and the insanity of the other, the grantor was

**CANCELLATION OF INSTRUMENTS—Continued.**

not required to make a demand for performance of the condition before suing to cancel the deed.

*Huffman v. Rickets*, 526, 544 (8).

2. *Deed Given for Future Support. — Complaint. — Sufficiency.*—A complaint to cancel a deed executed to a husband and wife in consideration of conditions subsequent for the grantor's support, alleging that one of the grantees was dead and the other insane, and that no person representing the surviving grantee furnished the required support to grantor, was not insufficient notwithstanding it did not allege that the failure of defendants to furnish the support was due to fraud or bad faith or induced by a wilful intention to disregard the conditions of the deed.

*Huffman v. Rickets*, 526, 529 (1).

**CARRIERS—**

1. *Carriage of Freight.—Conversion.—Evidence.*—Where an automobile truck was shipped to the order of consignor with instructions to notify a third person, evidence showing that on the arrival of the truck at the destination a representative of the firm through whom the order was placed with the consignor, together with a representative of such third person, removed the truck from the car in which it was shipped, and induced defendant's agent to permit its removal from the premises upon their statement that such agent would receive a release from consignor during the day, warranted a finding that there had been an actual delivery contrary to the terms of the bill of lading, and without justification on the theory of a waiver of such terms, since the representative of the firm through whom the order was placed did not claim to have authority to waive the requirements of the bill of lading.

*Lake Shore, etc., R. Co. v. W. H. McIntyre Co.*, 191, 201 (4).

2. *Carriage of Freight.—Delivery.*—Where shipment was made to consignor's order under a bill of lading stipulating for notice to the buyer, for delivery only on presentation of the bill, and against inspection, the carrier was not authorized to deliver the property to the buyer for inspection without the authority or consent of the consignor.

*Lake Shore, etc., R. Co. v. W. H. McIntyre Co.*, 191, 205 (7).

3. *Carriage of Freight.—Exemption from Common-Law Liability.—Burden of Proof.*—Where the property carried was committed exclusively to the carrier, and the carrier's common-law liability is relied on for injury thereto, the carrier has the burden of alleging and proving that the shipment was within an exception to such rule of liability. *Nashville, etc., R. Co., v. Johnson*, 416, 430 (9).

4. *Carriage of Freight.—Wrongful Delivery.—Conversion.*—The delivery of freight without justification to a party other than the consignee is a wrongful conversion thereof; hence, under a bill of lading to the order of consignor with directions to notify a third person, the carrier, to avoid liability for delivery to such third person without the order or direction of consignor, must show justification for its act, and justification is not shown by the mere fact that the delivery was solely for inspection, especially where the bill of lading specifically provides against inspection.

*Lake Shore, etc., R. Co. v. W. H. McIntyre Co.*, 191, 198 (2).

5. *Carriage of Freight.—Wrongful Delivery.—Liability.*—Where an automobile truck was shipped to consignor's order with instructions to notify a third person of its arrival, the carrier was not relieved from liability for its act in delivering the truck to such third person contrary to the terms of the contract of shipment by the fact that the consignor sent agents to make repairs to the truck while it was in the hands of such third person, where it appeared that consignor,



**CARRIERS—Continued.**

upon learning of the wrongful delivery, presented its claim against the carrier and continued to press same with no intention of releasing the carrier from liability.

*Lake Shore, etc., R. Co. v. W. H. McIntyre Co.*, 191, 204 (6).

6. *Carriage of Freight.—Wrongful Delivery.—Instructions.*—Where a carrier delivered an automobile truck to the buyer in violation of the bill of lading under which the property was shipped to consignor's order with instructions to notify the buyer, and which stipulated for the presentation of the bill of lading before delivery, and against the right of inspection, an instruction requested by the carrier, in an action against it for conversion because of such wrongful delivery, stating that since the contract of purchase did not provide the time of payment the same would become due upon delivery of the truck in good repair and running order, was properly refused, since it not only contradicted the stipulations of the bill of lading and stated no legal proposition to justify the delivery, but it also assumed facts not proved and was inapplicable to the evidence. *Lake Shore, etc., R. Co. v. W. H. McIntyre Co.*, 191, 205 (8).
7. *Carriage of Freight.—Wrongful Delivery.—Evidence.*—Where an automobile truck was shipped subject to consignor's order with instructions to notify a third person of its arrival, and the carrier delivered the truck to such third person in violation of the terms of the bill of lading, whereupon the consignor filed a claim against the carrier for the value of the truck on the theory of a conversion, and the evidence showed that the truck was incomplete in some equipments which were later furnished by the agency through whom the truck was ordered from consignor, that both such agency and the consignor sent men to adjust the truck and consignor furnished repairs for broken and defective parts, that the truck eventually proving to be unsatisfactory, was returned to the carrier, who notified the consignor that it held the property subject to its order, and that the consignor refused to accept same and insisted on its claim for conversion, the questions of whether consignor ratified the delivery, or whether the carrier was justified in making the delivery, so as to preclude recovery in an action for conversion, were for the jury and its finding was conclusive.  
*Lake Shore, etc., R. Co. v. W. H. McIntyre Co.*, 191, 202 (5).
8. *Carriage of Live Stock.—Action.—Issues.—Instructions.*—In an action by a railroad company, which was the terminal carrier, to recover on a check given to it for the freight charges due on a shipment of horses, where defendant answered on the theory that plaintiff to the exclusion of the initial and connecting carriers negligently injured the horses in transporting them, whereby defendant suffered damages in excess of the amount of the check, an instruction stating that if defendant proved by a fair preponderance of the evidence "that the plaintiff or its connecting lines injured or damaged his horses more than the amount of such check," etc., was erroneous in that it predicated a defense in part on an injury that may have been inflicted by the other carriers, but the error was harmless in view of the fact that the evidence showed without contradiction that the horses were injured while in plaintiff's possession.  
*Nashville, etc., R. Co. v. Johnson*, 416, 423 (4); 424 (4).
9. *Carriage of Live Stock.—Connecting Carriers.—Negligence.—Presumptions.*—Where freight, including live stock, is received by the initial carrier in good condition, and is delivered by the terminal carrier in a damaged condition, the latter has the burden of showing that the freight was not injured while in its possession, and in the



**CARRIERS—Continued.**

absence of such showing it will be presumed that the injury occurred on the line of the terminal carrier.

*Nashville, etc., R. Co. v. Johnson*, 416, 425 (5).

10. *Carriage of Live Stock.—Connecting Carriers.—Negligence.—Liability of Terminal Carrier.*—Where live stock was taken from the car of the initial carrier and reloaded into a car of insufficient capacity by the connecting carrier, who delivered the car without change in its condition to the terminal carrier, the latter by accepting the car and undertaking to transport the horses therein made such instrumentality its own, and could not avoid liability for injuries resulting from the condition of the car and not shown to have occurred on the line of the connecting carrier.

*Nashville, etc., R. Co. v. Johnson*, 416, 427 (6).

11. *Carriage of Live Stock.—Injuries.—Damages.*—In an action by a railroad company to recover freight charges for the transportation of a car of horses, in which defendant filed a counterclaim in two paragraphs, in the first praying damages in the sum of \$1,200, and in the second declaring on the same transaction and alleging damages in the sum of \$1,500 by reason of the injuries alleged and in the sum of \$100 for expense in an effort to cure the horses, with prayer for judgment in the sum of \$1,400, the amount that defendant could recover must be judged from the facts pleaded rather than from the prayer, so that, there being no evidence to sustain the alleged item of expenditure in an effort to cure the horses, the limit of recovery on such counterclaim was \$1,500, less the sum of \$433.20 which the uncontradicted evidence showed plaintiff entitled to recover; hence, a verdict awarding defendant \$1,200 was excessive.

*Nashville, etc., R. Co. v. Johnson*, 416; 432 (11).

12. *Carriage of Live Stock.—Negligence.—Pleading.*—In an action by a railroad company to recover freight charges for the transportation of a car of horses, an answer alleging that plaintiff in consideration of a promise to pay the sum claimed received the car of horses from defendant and undertook and agreed to carry them safely, that plaintiff negligently failed in the performance of the undertaking in that it negligently failed to supply them with bedding, whereby and by reason of which they were injured, etc., was not open to the objection that the injury was not traced to the negligence charged by any proper averments.

*Nashville, etc., R. Co. v. Johnson*, 416, 420 (1).

13. *Carriage of Live Stock.—Negligence.—Liability.—Instructions.*—Barring certain exceptions resulting from an act of God, or of the public enemy, or arising from the negligence of the shipper or from the inherent nature of the goods shipped, the common-law liability of a carrier makes it an insurer of the safety of a shipment intrusted to it, in the absence of a contract limiting its liability; hence, in a carrier's action for freight charges due on a car of horses, where defendant filed a counterclaim declaring on plaintiff's common-law liability for damages by reason of injury to the horses in transportation, and there was nothing to show the application of any exception to the rule, an instruction that railroad companies are liable as common carriers and are insurers of the safe delivery of property entrusted to them for transportation and that they will not be excused for failure to make a safe delivery was not erroneous. (*Cleveland, etc., R. Co. v. Rudy* [1909], 173 Ind. 1881, distinguished.)

*Nashville, etc., R. Co. v. Johnson*, 416, 428 (8), 430 (8).

14. *Carriage of Live Stock.—Negligence.—Pleading.*—In an action by a railroad company to recover freight charges for the transportation of a car of horses, defendant's counterclaim for damages, alleging delivery to an initial carrier who received and loaded the

**CARRIERS—Continued.**

horses into the car and undertook to deliver them safely at the place to which they were consigned, that said horses were transported and delivered by the initial carrier to another carrier who received and reloaded them and undertook to deliver them safely to the end of its line, and that the latter carrier delivered them to plaintiff who received them and undertook to carry and deliver them safely to defendant at the place to which they were consigned, and charging plaintiff and each of the carriers with negligence in loading the horses into a car of insufficient capacity, in failing to supply them with bedding, and in operating the car in a violent manner, whereby some of the horses were killed and others injured, to defendant's damage, was not open to the objection that it did not charge plaintiff with negligence in loading or transporting the horses.

*Nashville, etc., R. Co. v. Johnson*, 416, 421 (2).

15. *Carriage of Passengers.—Duty of Carrier.—Liability.*—A carrier, while not an insurer of the safety of its passengers, must exercise the highest degree of care practicable for their safety, and is responsible for injuries through its negligence, growing out of the condition of its road, character of its equipment, and the conduct of its servants; the passenger himself being without fault.

*Public Utilities Co. v. Cosby*, 252, 255 (2).

16. *Carriage of Passengers.—Injuries.—Pleading.*—A complaint showing that plaintiff was a passenger on defendant's freight train and alleging that while riding thereon the defendant suddenly, without warning, negligently and with great force and violence applied the air brakes while the train was running at a rapid rate of speed, thereby causing the train to stop suddenly and violently, whereby plaintiff was thrown from her chair and injured, sufficiently alleged facts constituting negligence.

*Vandalia R. Co. v. Darby*, 294, 298 (2).

17. *Carriage of Passengers.—Traveler on Freight Train.*—Where a woman, at the request of the conductor, entered the caboose of a freight train to accompany and care for an injured person who was being transported to a hospital, she became a passenger to whom the railroad company owed the duty of exercising the highest practical care and diligence in the operation of the train, regardless of the question of the conductor's authority under ordinary conditions to carry passengers on his train.

*Vandalia R. Co. v. Darby*, 294, 297 (1).

18. *Carriage of Passengers.—Care Required.—Passengers on Freight Train.*—A railway company carrying passengers on freight trains must exercise the highest degree of care for their safety, consistent with the usual and practical operation of such trains, and is responsible for any negligence which results in injury to a passenger while being so carried.

*Vandalia R. Co. v. Darby*, 294, 299 (3).

19. *Carriage of Passengers.—Passengers on Freight Trains.—Presumptions.—Assumption of Risk.*—The presumptions indulged in favor of passengers upon a regular passenger train arise also in favor of a passenger upon a freight train who is injured while passively submitting to the regulations of the company, but one who voluntarily becomes a passenger on a freight train assumes the risks and inconveniences necessarily and reasonably incident to such means of transportation, including the ordinary sudden bumping and jerking of cars in stopping and starting.

*Vandalia R. Co. v. Darby*, 294, 299 (4).

20. *Carriage of Passenger.—Street Cars.—Stopping Car on Signal.—Invitation to Passenger to Alight.—Instructions.*—An instruction to the jury that the stopping of a street car, at or near a regular stopping place, after a signal provided by the carrier to notify the

**CARRIERS—Continued.**

agents in charge of the car that a passenger desires to alight at the next stop has been given or caused to be given by a passenger on such car, is an invitation to such passenger to alight and such passenger has a right to alight the instant such car stops, and to rely on such car not being started until a reasonable time for such passenger to alight has been given, was a correct general statement of what a passenger may understand from a stop at or near a regular stopping place after a signal has been given, since if the stop is for a purpose other than permitting the passenger to alight it would be the duty of those in charge to use measures to prevent passengers from alighting.

*Terre Haute, etc., Traction Co. v. York*, 399, 402 (3).

21. *Injuries to Passengers.—Burden of Proof.—Contributory Negligence.—Instructions.*—An instruction in a passenger's action for personal injuries informing the jury that the burden was on plaintiff to prove the material allegations of the complaint and that on making such proof he would be entitled to recover, providing it was not shown by defendant that he was guilty of contributory negligence, though incomplete when standing alone in that it confined the establishing of contributory negligence to defendant, was not ground for reversal in view of the fact that the court by another instruction told the jury that it was for the jury to say from all the facts and circumstances of the cause whether or not the plaintiff's own act and conduct constituted contributory negligence.

*Public Utilities Co. v. Cosby*, 252, 258 (7).

22. *Injuries to Passengers.—Complaint.—Negligence.*—A complaint by a passenger against a street car company for injuries by being thrown from the platform of the car, alleging that plaintiff notified the conductor of his desire to alight, that the signal to the motorman was given and the speed of the car slackened, whereupon plaintiff went to the rear platform preparatory to alighting, and that defendant's servants, with full knowledge of plaintiff's position, negligently failed to stop the car and negligently increased its speed and caused it to give a sudden jerk, whereby plaintiff was thrown and injured, sufficiently charged negligence on the part of defendant.

*Public Utilities Co. v. Cosby*, 252, 257 (4).

23. *Injuries to Passengers.—Complaint.—Knowledge of Passenger's Position.*—A complaint by a passenger for injuries by being thrown from the platform of a street car, alleging that plaintiff, when near his point of destination, informed the conductor that he desired to alight, that the conductor signalled the motorman to stop the car, that the speed was thereupon reduced, that plaintiff, believing that the car would stop at his point of destination, stepped upon the platform preparatory to alighting, and that defendant's servants had full knowledge of his position, but negligently failed to stop the car and negligently increased its speed and caused the car to be jerked suddenly, whereby plaintiff was thrown, etc., sufficiently charged defendant's servants with knowledge of plaintiff's position upon the platform.

*Public Utilities Co. v. Cosby*, 252, 254 (1).

24. *Injuries to Passengers.—Contributory Negligence.*—It is not negligence *per se* for a passenger to go upon the platform of a moving car preparatory to alighting therefrom; hence the court can not say that plaintiff was guilty of contributory negligence on the allegations of a complaint showing that after making known to the conductor of the street car he was on that he desired to alight, that on nearing the point of his destination the speed of the car was reduced, whereupon plaintiff took his position on the rear platform preparatory to alighting, and that while in such position defendant's servants negligently failed to stop the car and negligently

**CARRIERS—Continued.**

increased its speed and caused the car to be jerked suddenly, whereby plaintiff was thrown and injured.

*Public Utilities Co. v. Cosby*, 252, 256 (3).

25. *Passenger Alighting from Street Car.—Duty of Employes.*—Employes in charge of a street car must use the highest degree of care consistent with the mode of conveyance and the transaction of the business, to see and know that no passenger is alighting before starting the car, but they are not required to know that no passenger is in the act of alighting before putting the car in motion.

*Terre Haute, etc., Traction Co. v. York*, 399, 400 (1).

26. *Passenger Alighting from Street Car.—Evidence.—Instructions.*—In a passenger's action for injuries sustained in alighting from a street car, the conductor's testimony that he saw plaintiff attempting to alight, that she stepped off before the car stopped, and that the car ran eight or ten feet after she stepped off, was not susceptible to the inference that the conductor saw plaintiff getting off the car after it had stopped, and in view of such evidence the error in an instruction, stating that employes in charge of street cars must know that no passenger is in the act of alighting before again putting the car in motion, can not be regarded as harmless.

*Terre Haute, etc., Traction Co. v. York*, 399, 401 (2).

27. *Passenger on Freight Train.—Injuries.—Res Ipsa Loquitur.*—The doctrine of *res ipsa loquitur* applies to a passenger injured while riding on a freight train the same as when riding on a passenger train, but such passenger assumes the risks and inconveniences necessarily and reasonably incident to such transportation.

*Vandalia R. Co. v. Darby*, 294, 300 (5).

28. *Passenger on Freight Train.—Injuries.—Instructions.*—In an action for injuries to a passenger while riding on a freight train, where the evidence showed that plaintiff went upon such train at the invitation of the conductor for the purpose of attending and caring for a person who was being transported to a hospital, an instruction that if plaintiff was injured by reason of the negligence of defendant as charged in her complaint, while rightfully upon the train, without any fault on her part, a finding for plaintiff would be authorized, was not objectionable as authorizing a finding against defendant without showing the relation of passenger and carrier.

*Vandalia R. Co. v. Darby*, 294, 301 (6).

**CASES—****DISTINGUISHED:**

*Chicago, etc., R. Co. v. Cunningham*, 33 Ind. App. 145, see *Pottlitzer v. Citizens Trust Co.*, 45, 63 (9).

*Cleveland, etc., R. Co. v. Rudy*, 173 Ind. 181, see *Nashville, etc., R. Co. v. Johnson*, 416, 428 (8), 430 (8).

*Hadley v. Lake Erie, etc., R. Co.*, 21 Ind. App. 675, see *Pottlitzer v. Citizens Trust Co.*, 45, 63 (9).

**CHANGE OF VENUE—**

See **DIVORCE** 4, 5.

Motion for, see **APPEAL** 4.

**CHILD—**

Custody and support of, see **DIVORCE** 1-4.

**COLLATERAL ATTACK—**

See **JUDGMENT** 4; **TAXATION** 4.

**"COMMON LABOR"—**

See WORDS AND PHRASES.

**COMMON-LAW LIABILITY—**

See CARRIERS 3.

**COMPENSATION—**

As farm hand, action for, see TRIAL 9.

Not allowed for work on Sunday, see TAXATION 1.

Right to, see GUARDIAN AND WARD 2.

**COMPLAINT—**

See PLEADING 4-10.

**CONCLUSION—**

Of law, see TRIAL 1.

**CONCLUSIVENESS—**

See JUDGMENT 5.

Of decision, see APPEAL 55, 56.

Of findings, see APPEAL 114.

Of verdict, see APPEAL 111, 113.

**CONDITIONS SUBSEQUENT—**

See DEEDS 2, 3, 8.

**CONNECTING CARRIERS—**

See CARRIERS 9, 10.

**CONSIDERATION—**

See DEEDS 3-7.

**CONSTITUTIONAL LAW—**

When a constitutional question is presented, the appeal must be to the Supreme Court, see APPEAL 105, 105a.

**CONSTRUCTION—**

See CONTRACTS 1-2; DEEDS 1, 8, 9; STATUTES 1, 2.

Of leases, see MINES AND MINERALS 2-4.

Of watercourse, see RAILROADS 22.

**CONTRACTOR—**

Bond of, see HIGHWAYS 2-4.

**CONTRACTS—**

See SALES 12-14.

Breach of, see SALES 1, 3-10.

Of wife, see HUSBAND AND WIFE 8.

1. *Construction by Parties.*—Where the meaning of a contract is indefinite, obscure or ambiguous, the court will consider, and under

**CONTRACTS—Continued.**

certain conditions will adopt the construction and practical interpretation placed thereon by the parties.

*Lemcke v. Hendrickson*, 323, 330 (2).

- 1a. *Construction by Parties.*—An agreement entered into by a tenant in common with his cotenant whereby the latter was induced to join the former in a trade of their common property for other property, in which they were to hold their interests in the ratio of three-fifths and two-fifths respectively, and stipulating that the latter's interest in the net rental proceeds should be not less than \$400 annually, provided the net proceeds equal that amount, does not mean that the latter shall have that amount in any case, to the exclusion of the former, if necessary, so that, the annual net rental proceeds exceeding \$1,000, they share in the entire amount in the ratio of their interests in the property.

*Lemcke v. Hendrickson*, 323, 330 (3).

2. *Construction.—Waiver of Mechanic's Lien.*—A contract for the construction of a house providing that the contractor is to "transfer same to first party clear of all claims or incumbrances," is not to be construed as an agreement to transfer clear only of the claims and encumbrances of third persons, so that the contractor was thereby precluded from enforcing a mechanic's lien.

*Fuhrman v. Frech*, 349, 350 (1).

3. *Letters.—Evidence.*—Proof that a letter was dictated on a certain date and that the writer had a telephone conversation with the addressee, as therein mentioned, was insufficient to warrant the consideration of such letter as one of a series constituting the alleged contract of the parties, in the absence of proof that such letter was actually mailed.

*Graham v. Henderson Elevator Co.*, 697, 707 (12).

4. *Oral Modification.—Fraud.*—A person can not rely upon a mere verbal change of a written contract, and where there is no right to rely on such verbal modification there can be no fraud.

*Napier Iron Works v. Caldwell, etc., Iron Works*, 317, 322 (5).

5. *Power to Contract.—Enforcement.*—All persons who are competent may contract with each other as they please and the courts will enforce their agreements if the same are legal and not against public policy.

*Supreme Lodge, etc. v. Miller*, 269, 271 (1).

6. *Action.—Complaint.—Sufficiency.*—A complaint showing that plaintiffs furnished to defendants, contractors for a school building, certain materials under a contract whereby defendants were to deliver in payment a valid warrant on the township, and that a warrant for the specified amount was delivered to plaintiffs with representations that it was a valid warrant, but that at the time of its issuance the indebtedness of the township exceeded the constitutional limit, so that the warrant was invalid and created no indebtedness against the township, all of which defendants knew, and of which the plaintiffs were ignorant at the time of accepting such warrant, and seeking to recover the value of such materials, was sufficient on demurrer as against the objection that it did not show a township indebtedness in excess of the limit at the time the debt to plaintiffs was created, and that there was not at that time sufficient money in the treasury of the township to pay same.

*Everly v. Ball*, 7, 11 (1).

**CONTRIBUTORY NEGLIGENCE—**

See CARRIERS 21, 24; MASTER AND SERVANT 12, 13, 16, 17, 22, 23; NEGLIGENCE 8-10; RAILROADS 14.



**CONVERSION—**

See CARRIERS 1, 4.

1. *Excessive Damages.—Review.*—In an action against a carrier for conversion through the wrongful delivery of an automobile truck, where there was evidence, though conflicting, to show that the truck was worth \$712.50, together with other evidence properly for the consideration of the jury in determining the amount of recovery, a verdict for \$700 was not such as to convince the court that the jury acted from prejudice, partiality or corruption, and therefore could not be disturbed on the ground that it was excessive.  
*Lake Shore, etc., R. Co. v. W. H. McIntyre Co.*, 191, 207 (10).
2. *Justification.—Question of Fact.*—Efforts of a carrier of freight to justify its act in delivering to a third person contrary to the provisions of the bill of lading, by showing waiver or ratification, presented questions for the jury, where the facts were in dispute or were such as to which reasonable minds might differ.  
*Lake Shore, etc., R. Co. v. W. H. McIntyre Co.*, 191, 200 (3).

**CONVEYANCES—**

See EASEMENTS 3; HUSBAND AND WIFE 9, 10.

In consideration of support, see DEEDS 1.

**COSTS—**

See APPEAL 26, 27.

**COUNTIES—**

1. *Board of County Commissioners.—Liability for Negligence.*—A county, being an involuntary *quasi* corporation created by the sovereign power of the State for governmental purposes and whose functions are to be performed solely as provided by law, is not liable for the negligence of its officers in the absence of statute creating liability, and the negligent failure of a board of county commissioners to keep the courthouse steps in proper condition, resulting in injury to a person attempting to use same, forms no exception to the rule, notwithstanding §5989 Burns 1914, §5748 R. S. 1881, which requires such boards to keep the public buildings in repair, since such statute imposes no liability for failure so to do.  
*McDermott v. Board, etc.*, 209, 212 (1).
2. *Board of County Commissioners.—Negligence.—Individual Liability.*—The board of county commissioners acts for and represents the county and is an entity for the performance of the business falling within the statutory scope of its duties, and its failure to discharge a duty is nonfeasance in office for which the county is not liable; and, aside from the privity of relation which individual members of the board bear to the county by reason of being officers charged with the performance of prescribed duties, their relation to the county is the same as that of any other inhabitant, neither conferring greater authority nor imposing additional responsibility; hence, though it is the statutory duty of the board of county commissioners to keep the public buildings in repair, the negligent failure of the board to do so will not render the members individually liable to one injured by reason of such omission.  
*McDermott v. Board, etc.*, 209, 215 (3).

**COUSINS—**

See DESCENT AND DISTRIBUTION 1.

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**CREDITORS—**

Duty to, see RECEIVERS 1.

Intervention by, see RECEIVERS 2, 6.

**CUSTOMS AND USAGES—**

When a contract of sale is neither ambiguous nor uncertain and clearly shows the time and manner of shipment, trade usages and customs are not to be considered in its construction, see SALES 12.

**DAMAGES—**

See ASSAULT AND BATTERY; CARRIERS 11; MASTER AND SERVANT 24; WATERS AND WATERCOURSES 4.

Special, see SALES 8.

1. *Injury to Wife.—Instruction.*—In a married woman's action against her landlord for personal injuries caused by a defect in the premises, where the complaint showed that plaintiff was employed by an electrical company, and the only evidence on the subject of wages earned by plaintiff had relation to the wages she earned by reason of such employment, an instruction telling the jury that in determining the amount of damages to be awarded it had a right to consider plaintiff's loss of time and wages, if any, did not authorize the consideration of loss of time or wages for which the husband would be entitled to recover, and was properly given.

*P. B. Arnold Co. v. Buchanan*, 626, 633 (4), 634 (4).

2. *Personal Injuries.—Excessive Damages.*—A verdict for \$600 for injuries to a six-year-old boy who was struck by an automobile was not excessive in view of evidence showing that the collision rendered him unconscious and resulted in a severe shock to his nervous system and caused his eyes to become crossed.

*J. F. Darmody Co. v. Reed*, 662, 667 (5).

**DANGER—**

Hidden, see MASTER AND SERVANT 4.

**DEATH—**

1. *Action.—Evidence.*—In an action for the benefit of the next of kin to recover damages for a wrongful death, all the facts and circumstances surrounding the parties and those showing the ability and probable inclination of decedent to continue contributions to his next of kin are admissible.

*Pennsylvania Co. v. Reesor*, 636, 648 (10).

2. *Right of Recovery.—Pecuniary Loss.*—In an action to recover damages for a wrongful death the recovery must be based on the theory that the next of kin have sustained a pecuniary loss, and it need neither be shown nor exist that decedent was under any legal obligation to contribute to the support of his next of kin.

*Pennsylvania Co. v. Reesor*, 636, 648 (9).

**DEDICATION—**

1. *Streets.—Ownership of Fee.*—One having a perfect title to the lots abutting on each side of a street theretofore laid out and dedicated for a street, has title of equal strength and validity to the strip included in the street.

*Jose v. Hunter*, 569, 581 (4).

2. *Vacation.—Reversion to Abutting Owner.*—In order that land embraced in a street which has been vacated may revert to the abutting owner, such land must have been originally laid off or dedicated for a street by those who at the time owned the land abutting on each side thereof.

*Jose v. Hunter*, 569, 583 (7).

**DEEDS—**

See EASEMENTS 4; EJECTMENT 2, 3.

As mortgage, see MORTGAGES 1.

1. *Conditions.—Conveyance in Consideration of Support.—Construction.—Enforcement.*—Contracts by which aged and infirm persons convey property to others in consideration of an agreement for support are in a class to themselves with reference to their interpretation and enforcement, and, being regarded as imposing personal obligations which are nondelegable except with the consent of the grantor, will be enforced without reference to the form or phraseology of the writing by which they are expressed, or whether by the strict letter of the law a forfeiture is expressly provided for.  
*Huffman v. Rickets*, 526, 532 (2).
2. *Conditions Subsequent.—Breach.—Termination of Estate.—Reëntry.—Sufficiency.*—Where the surviving grantee in a deed made on condition subsequent for the care and support of grantor, became unable to perform by reason of insanity, his guardian had no power to deliver possession or reconvey for condition broken, so that the act of grantor plainly indicating to such guardian that she did not waive the breach of the condition, and that she claimed the lands as her own, was under the circumstances the equivalent of a sufficient reëntry.  
*Huffman v. Rickets*, 526, 546 (10).
3. *Consideration. —Future Support. —Conditions Subsequent.*—A grant of lands in consideration of an agreement for the future support of the grantor, in the absence of a stipulation to the contrary, creates in the grantee an estate on condition subsequent.  
*Huffman v. Rickets*, 526, 533 (3).
4. *Consideration.—Future Support.—Breach of Condition.—Enforcement of Forfeiture.*—In the absence of any waiver or countervailing right, courts of equity have jurisdiction to render effective a forfeiture growing out of the breach of a condition subsequent for the care and support of a grantor by a cancellation of the instrument, and the real basis of such equitable jurisdiction is the situation of the grantor rather than that of the grantee.  
*Huffman v. Rickets*, 526, 534 (5).
5. *Consideration.—Future Support.—Rescission.—Fraud.*—The rule that in cases where conveyances are made on the mere agreement to support as the consideration therefor, as distinguished from a conveyance made on such an agreement as a condition subsequent, the conveyance may be rescinded only when from the circumstances attending the failure to perform it may be inferred that grantee never intended to perform and that consequently the contract on his part was fraudulent from its inception, does not prevail in this State.  
*Huffman v. Rickets*, 526, 541 (7).
6. *Considerations.—Future Support.—Breach of Condition.—Impossibility of Performance.*—A grantor is not precluded from obtaining a decree cancelling a deed made to a husband and wife on a condition subsequent for grantor's care and support, where one of the grantees dies and the other becomes insane, thus rendering performance by them impossible, either upon the theory that such impossibility is produced by an act of God, or that it vests the estate in the surviving grantee freed from the condition, or that grantor may be required to accept performance from the personal representatives of the grantees. *Huffman v. Rickets*, 526, 536 (6), 541 (6).
7. *Consideration.—Support.—Breach of Condition.—Termination of Estate.*—Where the surviving grantee in a deed made on condition subsequent for the care and support of grantor, became incapable of performing by reason of insanity, such fact did not of itself

**DEEDS—Continued.**

terminate the estate, but rendered it susceptible to determination by some act of the grantor equivalent to a reëntry at common law.

*Huffman v. Rickets*, 526, 546 (9).

8. *Construction.—Consideration.—Future Support.—Conditions Subsequent.*—A deed conveying land to a husband and wife subject to the condition that grantees are to maintain and care for grantor for her natural life, and providing that if grantees fail or refuse to comply with the condition in a reasonable manner the deed shall at once become null and void, created an estate on condition subsequent, for a breach of which the estate became forfeited and could be recovered.

*Huffman v. Rickets*, 526, 533 (4).

9. *Construction.—Granting and Habendum Clauses.*—A deed is to be construed as a whole and effect is to be given to each and every part if possible, and the intention of the parties as to the kind of estate conveyed, if clearly expressed, will be given effect regardless of the technical rule that the granting clause will prevail over the *habendum* or other parts of the deed tending to curtail or modify the estate conveyed, unless there is irreconcilable conflict, in which event the granting clause will prevail.

*Richards v. Richards*, 34, 39 (3).

**DEFAULT—**

In payment of rent, see LANDLORD AND TENANT 1, 2.

**DELIVERY—**

See CARRIERS 2.

Wrongful, see CARRIERS 4–7.

**DEMAND—**

When, not necessary, see CANCELLATION OF INSTRUMENTS 1.

**DEPOSITS—**

See BANKS AND BANKING.

**DESCENT AND DISTRIBUTION—**

1. *Cousins.—Representation.*—Under the provisions of §2994 Burns 1914, §2471 R. S. 1881, of the statute of descent, construed in connection with §§2990–2993 Burns 1914, §§2467–2470 R. S. 1881, the rule of inheriting by representation does not apply in favor of the descendants of a deceased member of a class of collateral kindred entitled to take thereunder, so that where an intestate's nearest relatives in the order of inheritance are first cousins, they take to the exclusion of descendants of other first cousins.

*Avery v. Vail*, 99, 104 (3).

2. *Right of Inheritance.—Statutes.*—Persons claiming to inherit property must base their right on some statutory provision, and it is the purpose of the statute of descent (§2990 *et seq.* Burns 1914, §2467 *et seq.* R. S. 1881) to provide for the disposition of the property of persons dying intestate, under all conditions and circumstances that may arise.

*Avery v. Vail*, 99, 104 (2).

**DIRECTING VERDICT—**

See NEGLIGENCE 3; TRIAL 4–6.

**DISCRETION OF COURT—**

See EVIDENCE 4; RECEIVERS 2.

**DISMISSAL—**

See APPEAL 41; JUSTICES OF THE PEACE 2.

Right to , without prejudice, see TRIAL 4.

**DIVIDENDS—**

See RECEIVERS 1.

**DIVORCE—**

1. *Custody and Support of Children.—Modification of Decree.*—While an order modifying a divorce decree with respect to its provision for the custody and support of minor children, should be based on the subsequent conduct and changed conditions of the parties, the welfare of the children is the controlling consideration, and the pecuniary ability of the father must also be considered.  
*Julian v. Julian*, 520, 525 (4).
2. *Custody and Support of Children.—Modification of Decree.—Evidence.*—On evidence showing that the health of a party charged with the support of minor children under a divorce decree was not as good as at the time the decree was rendered, and that his work was more arduous, and in view of the inferences the court was warranted in drawing therefrom, its order modifying the decree by reducing the weekly amounts the party was required to pay could not be disturbed.  
*Julian v. Julian*, 520, 525 (5).
3. *Custody and Support of Children.—Modification of Decree.—Knowledge of Parties.*—Parties submitting to the jurisdiction of a court in a divorce proceeding are chargeable with knowledge of the fact that such court will make such order for the support of their minor children as the condition of the parties may then warrant, that as such conditions may thereafter change the order on proper motion will be modified accordingly, and that the jurisdiction with respect to all such motions will continue in such court.  
*Julian v. Julian*, 520, 524 (3).
4. *Custody and Support of Children.—Modification of Decree.—Jurisdiction.—Change of Venue.*—Under §1084 Burns 1914, §1046 R. S. 1881, authorizing the court in granting a divorce to make provision for the guardianship, custody, support and education of the minor children of such marriage, the jurisdiction of the court, in so far as the welfare of the children is concerned, continues until they become of age, so that notwithstanding §422 Burns 1914, §412 R. S. 1881, authorizing changes of venue in civil cases, there can be no change of venue from the court having such jurisdiction in a proceeding to modify the decree in relation to the custody and support of children.  
*Julian v. Julian*, 520, 522 (1), 524 (1).
5. *Finality of Decree.—Custody and Support of Children.—Change of Venue.*—While there may be a change of venue from the county in divorce proceedings where the object of the proceedings is to secure a divorce, or settle property rights or alimony, the judgment decreeing a divorce, adjudicating the property rights and providing for alimony, is final and can be attacked only on appeal for error occurring at the trial, and the right to a change of venue does not extend to subsequent proceedings affecting the decree in relation to custody and support of children of the parties.  
*Julian v. Julian*, 520, 524 (2).

**EASEMENTS—**

By prescription, see RAILROADS 18.

**EASEMENTS—Continued.**

1. *Change in Easement.—Easement Appurtenant.*—An easement appurtenant is a burden upon the servient estate which can not be used for a purpose beyond that which was in contemplation of the parties at the time of its creation, nor for the benefit of lands other than those to which it adheres, except by consent of the owner of the servient estate.  
*Kixmiller v. Baltimore, etc., R. Co.*, 686, 692 (3).
2. *Construction.—Construction by Parties.*—Where the grantor of land for a factory site, together with a right of way over a strip still retained by grantor, silently acquiesced in the acts of the grantee and another in procuring a side track to be constructed over such strip and used for shipping purposes of the factory erected on the land conveyed, the facts were sufficient to characterize the easement granted as being broad enough in the contemplation of the parties to include the right to cause the side track to be laid and used as indicated.  
*Kixmiller v. Baltimore, etc., R. Co.*, 686, 692 (2).
3. *Conveyances.—Effect.*—Where a deed conveying land to be used for a factory site by its terms also granted a right of way over a strip lying between the land conveyed and the right of way of a railroad company, the right acquired was in the nature of an easement appurtenant to the lands conveyed and passed by successive mesne conveyances of the land.  
*Kixmiller v. Baltimore, etc., R. Co.*, 686, 691 (1).
4. *Deed.—Variation by Parol.—Findings.*—While a deed granting an easement, like other written contracts, is the repository of the entire agreement, and, in the absence of fraud, can not be varied by parol evidence, the actual consideration may be shown by parol to have been different from that expressed in the deed; hence in an action to enjoin interference with plaintiff's easement for a pipe line over the land of defendants, where the deed did not definitely locate the line of easement, findings on parol evidence showing that grantor pointed out the way for the pipe line as an inducement to the purchase of the land to which the easement was appurtenant, and that this entered into the consideration for the purchase, were not objectionable as being outside the issues or as tending to vary the terms of the deed.  
*Shedd v. American Maize, etc., Co.*, 146, 172 (14).
5. *Easement Appurtenant.—Severance.—Change.*—An easement appurtenant can not be severed from the estate to which it is attached and be made the subject of an independent conveyance, nor can it be changed to an easement in gross by any act of the owner of the dominant estate. *Kixmiller v. Baltimore, etc., R. Co.*, 686, 693 (4).
6. *Establishment and Protection.—Injunctive Relief.—Complaint.*—An indefinite easement or right of way which is not specifically located and described can not be established and protected and described; hence a complaint to enjoin encroachments upon or interference with an easement or right of way, which does not furnish the means or data for entering a definite decree, including a definite description as to dimensions and location, is insufficient.  
*Shedd v. American Maize, etc., Co.*, 146, 154 (1).
7. *Interference.—Suit for Injunctive Relief.—Complaint.*—A complaint to enjoin defendants from interfering with the construction of a pipe line across defendants' land pursuant to the grant of an easement for same so as to connect plaintiff's premises with a lake, was insufficient, where it did not describe the real estate over which the easement was granted, and did not allege that the way over which the pipe line was to be extended into the lake had been

**EASEMENTS—Continued.**

located by any one, or that plaintiff had requested defendants to select the location and that they had failed and refused to do so, or that they had selected an unreasonable location, or that plaintiff had itself chosen the route.

*Shedd v. American Maize, etc., Co.*, 146, 155 (5).

8. *Interference.—Suit for Injunctive Relief.—Parties.*—A decree enjoining defendants from interfering with the construction of a pipe line across their land, pursuant to the grant of an easement therefor, so as to connect plaintiff's premises with a lake at a point in a harbor maintained at the mouth of a stream emptying therein, was not contrary to law on the ground that third persons claiming an interest in such harbor had not been permitted to intervene, since, in view of findings showing that the interests of such third persons consisted merely in a right equal with that of defendants to dredge the harbor and make it suitable for general use, that the same had not been made suitable for lake vessels, that plaintiff's pipes had been laid below the bend of such harbor and could be lowered by defendants at any time at a small cost to be borne by them, and from which it does not appear that the pipes will ever become an obstruction or interfere with any right of such third persons, the latter were not necessary parties to the suit.

● *Shedd v. American Maize, etc., Co.*, 146, 179 (17).

9. *Interference.—Suit for Injunctive Relief.—Findings.*—In a suit to enjoin interference with the construction of a pipe line across defendants' land and into a lake pursuant to the grant of an easement therefor, findings showing that during the negotiations for the sale to plaintiff of the land to which the easement was appurtenant defendants pointed out the line of the proposed easement, and again pointed it out after the sale was consummated, in each instance locating it east of a certain pier, and that plaintiff in extending the pipe line from a point where prior work of construction had ceased changed to a more easterly course than that indicated by extending the line in the direction pursued in such prior construction, so as to extend into the lake east of the pier, instead of west thereof as would otherwise have been the case, do not show that the course of the easement was changed from the line originally pointed out, nor are findings showing that plaintiff did not demand or request defendants to locate the remaining portion of the easement either before or after entering into the contract for such extension, in conflict therewith in the absence of a finding that there was an agreement to change the location as originally pointed out; and hence such findings supported the conclusions of law in favor of plaintiff.

*Shedd v. American Maize, etc., Co.*, 146 174 (15).

10. *Location.—Change of Location.*—When an easement or right of way has once been selected and located, it can not be changed by either party without the consent of the other.

*Shedd v. American Maize, etc., Co.*, 146, 155 (4).

11. *Location.—Persons Entitled to Locate Way.*—When an unlocated right of way is granted, or reserved, the owner of the servient estate may, in the first instance, designate a reasonable way, and if he fails to do so, when requested, the owner of the dominant estate may designate it.

*Shedd v. American Maize, etc., Co.*, 146, 154 (2).

12. *Location.—Selection of Route.*—Under a grant of an easement for a pipe line across defendants' land and into a lake the interested parties could make any reasonable location of the easement on the property over which it extended, so long as they did not encroach upon or interfere with other property.

*Shedd v. American Maize, etc., Co.*, 146, 158 (8).



**EASEMENTS—Continued.**

13. *Location.—Selection by Owner of Dominant Estate.*—When the owner of the dominant estate or easement designates the location of the easement, he is required to select a route that is reasonable as to both parties in view of all the circumstances and that will not unreasonably interfere with the grantor, or owner of the servient estate, in the enjoyment of his property.  
*Shedd v. American Maize, etc., Co.*, 146, 155 (3).
14. *Location.—Riparian Rights.*—Where defendants granted to plaintiff an easement for a pipe line through the land of defendants and into a lake on which such land fronted, and plaintiff had constructed the pipe line to a point near the shore of the lake, the location of the pipe line from that point into the lake was governed by the rules for the location of any easement granted, and the general rule for the determination of that portion of submerged lands over which riparian rights may be asserted, as between adjoining property owners, by extending lines from the water's edge at right angles to the prevailing shore line was inapplicable.  
*Shedd v. American Maize, etc., Co.*, 146, 156 (7).
15. *Occupancy.—Right to.*—Where a manufacturing company is entitled to use a strip of ground for a right of way, its occupancy by a railroad company as agent for its benefit is not unlawful.  
*Kixmiller v. Baltimore, etc., R. Co.*, 686, 696 (7).
16. *Suit to Enjoin Interference.—Defenses.—Creation of Nuisance.*—Where plaintiff sought to enjoin interference with the laying of a pipe line across the land of defendants and into a lake pursuant to the grant of an easement for such purpose, the relief sought could not be denied on the ground that the findings showed that the establishment of such pipe line would be a nuisance by reason of the pollution of water by the outfall discharged therefrom, where it appeared from other findings that defendant had selected the location for such easement, and that for two years prior to the alleged interference the discharge from plaintiff's partially constructed pipe line had polluted the water, of which fact defendants had knowledge and of which they had made neither complaint nor objection, and in the absence of a showing that the completion of such pipe line would in any way increase the pollution.  
*Shedd v. American Maize, etc., Co.*, 146, 176 (16).

**EJECTMENT—**

1. *Burden of Proof.*—In an action for possession of real estate the burden is on the plaintiff to establish by affirmative proof his title and right to possession.  
*Jose v. Hunter*, 569, 580 (2).
2. *Evidence.—Erroneous Description in Deed.*—Where plaintiff sought the recovery of a strip of land on which his lots abutted and which had formerly been a public street, a deed to plaintiff's predecessor in title, showing that the strip had been laid out as a street, was not inadmissible in evidence simply because of an error in the description of the land conveyed and apparent on the face of the deed.  
*Jose v. Hunter*, 569, 581 (5).
3. *Evidence.—Deeds.*—Where plaintiff, who owned the lots abutting on each side of a vacated street, sought to recover possession of the strip formerly included in the street, all the conveyances showing plaintiff's chain of title to the lots back to the original owner who dedicated the strip, as well as any evidence showing or tending to show that the strip was laid out or dedicated for a street, was admissible.  
*Jose v. Hunter*, 569, 582 (6).
4. *Findings.—Right to Possession.*—In an action in ejectment, a conclusion of law that plaintiffs are the owners in fee simple and are entitled to possession, can not stand where there was no finding



**EJECTMENT—Continued.**

that plaintiffs were entitled to the possession of the real estate in controversy, and the omission is not cured by a finding that title "rested" in plaintiffs. *Jose v. Hunter*, 569, 588 (12), 589 (12).

5. *Occupying Claimants.—Recovery for Improvements.—Color of Title.—Good Faith.*—Where the findings show color of title in an occupying claimant, such finding, in the absence of anything to the contrary, would give rise to the presumption of good faith in the making of the improvements for which recovery is sought, but a further finding that the improvements were made with full knowledge of the rights of plaintiff is inconsistent with the theory that they were made in good faith. *Jose v. Hunter*, 569, 588 (11).
6. *Occupying Claimants.—Recovery for Improvements.—Good Faith.—Presumption and Burden of Proof.*—Under §1121 Burns 1908, §1074 R. S. 1881, providing for the recovery by an occupying claimant for taxes and for improvements when made in good faith under color of title, the occupying claimant has the burden of proof on the question of good faith, and is aided by the presumption of good faith in so far only that such presumption will determine the question in his favor in the absence of evidence to the contrary sufficient at least to weigh equally with it. *Jose v. Hunter*, 569, 586 (10).
7. *Occupying Claimants.—Evidence.—Admissibility.*—Where defendant in an action for possession of real estate sought by cross-complaint to recover for improvements under the occupying claimant's statute, testimony of defendant offered in support of the cross-complaint to the effect that a certain lawyer advised him that he could obtain complete title by bringing suit, and that he did take the action he was advised to take, was not within the rule that where a state or condition of mind becomes material in giving character to an act, the advice of counsel under the influence of which the act was done is controlling, since it did not relate to the state or condition of defendant's mind at the time he made the improvements, and was properly excluded not only on that ground but also on the ground that it involved the conclusion of the witness. *Jose v. Hunter*, 569, 584 (8).
8. *Title to Support.*—Plaintiff in an action for possession of real estate must recover on the strength of his own title and not on the weakness of that of his adversary. *Jose v. Hunter*, 569, 580 (3).

**ELECTIONS—**

Order of Board of Commissioners dismissing petition for an election under the Proctor Law is a judicial act from which an appeal will lie, see INTOXICATING LIQUORS.

**EMPLOYER'S LIABILITY ACT—**

See MASTER AND SERVANT 22, 23.

**ESTATE—**

Termination of, see DEEDS 2.

**ESTOPPEL—**

See SALES 14.

1. *Estoppel in Pais.—Pleading.*—Where a party relies upon estoppel in pais to avoid a defense set up in the special answer, he must plead it. *Standard Brewery v. Lacanski*, 499, 501 (2).
2. *Equitable Estoppel.—Use of Easement.*—Where the owner of land conveyed a portion thereof to be used for a factory site, and also

**ESTOPPEL—Continued.**

granted a right of way over an adjoining strip between the land conveyed and the right of way of a railroad company, on which strip a side track was subsequently built, and after the building of such side track grantor sold the remaining land to plaintiff, including the strip on which the side track was located, and plaintiff platted the land so purchased by him for factory sites, and after a conveyance by the grantee of the right of way to the railroad company, the latter extended the side track on a way laid out by plaintiff, to which plaintiff made no objection, plaintiff was estopped from contesting the right to use the strip of ground over which the side track was laid by the railroad company for the benefit of a manufacturing corporation located on land laid out by him, and which was inaccessible but for such side track.

*Kirmiller v. Baltimore, etc., R. Co.*, 686, 693 (5), 696 (5).

**EVIDENCE—**

See APPEAL 81; CARRIERS 1, 7, 26; CONTRACTS 3; DEATH 1; DIVORCE 2; EJECTMENT 2, 3, 7; HUSBAND AND WIFE 3, 4, 6; INSURANCE 1, 5; MALICIOUS PROSECUTION 2; MASTER AND SERVANT 24, 27, 35; NEGLIGENCE 3, 5; PHYSICIANS AND SURGEONS 6; RAILROADS 5, 12, 14, 21; SALES 2, 10, 11.

Admission of, see APPEAL 120.

Aider by, see PLEADING 1.

Objections to, see TRIAL 3.

Questions which go to the weight of the, are not reviewable on appeal where the evidence is both oral and documentary, see APPEAL 3.

1. *Admissibility.—Mortality Tables.*—Mortality tables are admissible in evidence upon the question of the life expectancy of decedent in an action for his wrongful death, without regard to whether evidence has been introduced as to decedent's manner of life or physical condition prior to and at the time of the injury, since such tables afford some evidence which the jury may consider along with other pertinent evidence in ascertaining the probable duration of the life in question, and are not admitted as fixing the expectancy of such life, or as forming a legal basis for a calculation.

*Deer v. Suckow Co.*, 277, 284 (6).

2. *Admissibility.—Opinions.*—Where a witness, in an action for fraud in the sale of a horse, had testified to facts showing that he possessed some information and skill in relation to the disease with which the horse was alleged to be afflicted, not within the common knowledge and experience of ordinary men generally, the admission of his testimony to the effect that the horse had "summer sores" was not reversible error; and, even were the witness not qualified as an expert, the admission of the testimony was not error, in view of the fact that it was based on observations of the witness and on facts within his personal knowledge related to the jury.

*Maywood Stock, etc., Co. v. Pratt*, 131, 137 (1).

3. *Chastity and Virtue.—Presumptions.*—In the absence of evidence to the contrary, a woman is presumed to be chaste and virtuous, while if proven to have been unchaste at a certain time a presumption of a continuance of such unchastity is indulged under some circumstances, but the latter presumption is not without limitation and would not apply against a woman whose life for two years following adulterous living bore all the *indicia* of chastity.

*Spade v. Hawkins*, 388, 397 (7).

4. *Experiments.—Similarity of Conditions.—Discretion of Court.*—The determination of whether conditions under which an experiment is made were substantially the same as those existing at the

**EVIDENCE—Continued.**

time of the occurrence under investigation, so as to render evidence of such experiments admissible, necessarily requires the exercise of some discretionary power by the trial court.

*Vandalia R. Co. v. Duling*, 332, 348 (7).

5. *Experiments.—Admissibility.—Similarity of Conditions.*—To render testimony admissible respecting experiments made subsequently to the killing of certain animals by defendant's train, to ascertain the distance at which objects could be seen in the light of the train's headlight, it was not essential that the conditions should have been exactly reproduced in all details, but it was sufficient if the conditions were shown to have been substantially the same as when the animals were killed, and any departure in such matter goes to the weight rather than to the admissibility of the evidence.

*Vandalia R. Co. v. Duling*, 332, 348 (6).

6. *Hearsay.—Admissibility.*—The voluntary statement of a physician who examined an injured person, made while the latter was unconscious, is inadmissible as being purely hearsay.

*J. F. Darmody Co. v. Reed*, 662, 670 (11).

7. *Judicial Knowledge.*—The court judicially knows that in each of the years from 1905 to 1908, inclusive, Wayne Township in Allen County had a population of more than 20,000 and not more than 75,000, according to the last preceding United States census.

*Stellhorn v. Board, etc.*, 14, 21 (5).

8. *Judicial Knowledge.—Days and Dates.*—The court judicially knows that neither March 1 nor May 15 fell on Sunday in either of the years from 1905 to 1908, both inclusive, and that the number of days from March 1 to May 15, inclusive, in each of said years, exclusive of Sundays, was sixty-five.

*Stellhorn v. Board, etc.*, 14, 18 (1).

9. *Presumption of Knowledge of Law.*—A litigant is presumed to know the full import of all pleadings filed in his behalf and the legal force to be given to his conduct as shown thereby.

*Donlon v. Maley*, 25, 33 (8).

**EXCEPTIONS—**

To ruling on demurrer to original complaint are taken out of the record by the filing of an amended complaint, see **APPEAL 97**.

**EXCEPTIONS, BILL OF—**

Application for reëxtension of the time for filing a, shall be made on the day prior to the day the time first given expires, see **APPEAL 7**.

*Contents.—Objections to Pleading.*—An original bill of exceptions provided for by §657 Burns 1908, Acts 1897 p. 244, should contain nothing but the evidence and matters incident thereto, so that no question is presented on an objection to the filing of a supplemental complaint set out in the original bill of exceptions.

*Jose v. Hunter*, 569, 579 (1).

**EXCESSIVE DAMAGES—**

See **ASSAULT AND BATTERY; CONVERSION 1; DAMAGES 2**.

**EXCESSIVE VERDICT—**

See **TRIAL 9**.

**EXECUTORS AND ADMINISTRATORS—**

See **APPEAL 9, 10**.

1. *Authority.—Appointment of Special Administrator.—Power of Court.*—The authority of an administrator properly appointed extends to and embraces all the property of which the decedent died possessed until his discharge or the revocation of his letters; and

**EXECUTORS AND ADMINISTRATORS—Continued.**

where there is a regular administrator duly appointed, qualified and acting, the court is without power to appoint a special administrator, since the jurisdiction of a court to grant letters of administration is statutory and there is no statutory provision for a special administrator where the estate is in the hands of a regular administrator. *Powell v. Jackson*, 597, 600 (1).

2. *Exceptions to Report.—Authority of Court.*—Where exceptions were filed to an administrator's final report on the ground that he had not accounted for a note owing to the estate by him personally, and issues were joined on the exceptions, the court had full power without the assistance of a special administrator to determine whether the alleged note was in fact an asset of the estate, and, if so, to set aside the report and order a new one, and §2762 Burns 1914, §2245 R. S. 1881, relating to the removal of the administrator, provided an ample remedy in the event of the administrator's refusal to obey such order. *Powell v. Jackson*, 597, 605 (2).
3. *Right to Sue.—Denial of Right.—Statutory Provisions.—Action by Special Administrator.*—Notwithstanding the provisions of §2810 Burns 1914, §2292 R. S. 1881, whereby the right of an administrator to sue can not be questioned except by pleading under oath, the court erred in sustaining the demurrer to certain answers in bar in an action by a special administrator against the regular administrator, where the question raised by such demurrer went to the authority of the court to appoint the special administrator rather than to the latter's authority to sue, and the answers stated facts to show that his appointment was unauthorized. *Powell v. Jackson*, 597, 606 (4).
4. *Status as Representative and Individual.—Collection of Debt Due From Administrator as Individual.—Authority of Court.*—An administrator as such has a status separate and distinct from himself as an individual, and hence, where suit becomes necessary for the enforcement of a claim alleged to be due the estate from him in his individual capacity, the court may order him as administrator to sue himself as an individual, and under §2839 Burns 1914, §2321 R. S. 1881, may appoint an attorney to represent the estate the same as in a proceeding for the collection of a claim from the estate in favor of the administrator. *Powell v. Jackson*, 597, 605 (3).

**EXPERIMENTS—**

See EVIDENCE 4, 5.

**FEES—**

Docket, see APPEAL 26.

**FELLOW SERVANTS—**

See MASTER AND SERVANT 26.

**FENCES—**

See RAILROADS 1.

**FINDINGS—**

See APPEAL 114, 115; TRIAL 10, 11.

**FORECLOSURE—**

See MORTGAGES 2-4.

Of tax lien, see TAXATION 4-7.

**FRAUD—**

See **CONTRACTS 4; DEEDS 5.**

1. *False Representations.—Liability.*—Where one makes an unqualified statement of a fact as of his own knowledge and induces another to act upon it, and the fact does not exist, the law will impute to him a fraudulent purpose.  
*Maywood Stock, etc., Co. v. Pratt*, 131, 142 (7).
2. *False Representations.—Instructions.*—Instructions in an action for fraud in the sale of a stallion afflicted with "summer sores," stating that if the stallion was in fact afflicted at the time of its purchase by plaintiff, with summer sores which rendered it unsound at the time, and defendant, not knowing whether it was afflicted or unsound, represented to plaintiff for the purpose of inducing him to purchase, that such stallion was not so afflicted, or that it was sound, and such statement or statements were believed and relied upon by plaintiff, he was entitled, if they were untrue, to recover; and that if a party makes material representations to induce another to purchase what he offers for sale, and the purchaser relies upon and in good faith believes same without knowing the contrary, and thereon purchases the property, which is in fact defective and not as represented, by reason of which he is damaged, a liability arises against the party making the representations regardless of whether he at the time knew that they were false; correctly stated the law applicable to the issues and evidence of the case, regardless of the fact that the complaint alleged that defendant at the time of making the representations knew that they were false.  
*Maywood Stock, etc., Co. v. Pratt*, 131, 139 (4), 141 (4).

**FRAUDS, STATUTE OF—**

1. *Pleading.*—Where a parol contract of sale within the statute of frauds is relied on by plaintiff, the defendant may claim the benefit of the statute under the issue formed by the general denial, without pleading the statute specially.  
*Graham v. Henderson Elevator Co.*, 697, 707 (13).
2. *Memorandum.—"Party to be Charged."*—The "party to be charged," under the statute of frauds, means the defendant to the action, and the memorandum must be signed by him, though it need not necessarily be signed by the plaintiff.  
*Graham v. Henderson Elevator Co.*, 697, 703 (9).
3. *Memorandum.—Parol Evidence.*—Parol evidence may be heard to apply a contract required by the statute of frauds to be in writing to its subject-matter, or to explain latent ambiguities, but not to supply facts to show the existence of the contract or to supply any of its terms. *Graham v. Henderson Elevator Co.*, 697, 707 (11).
4. *Sufficiency of Memorandum.—Sales of Goods.*—The memorandum relied on to except a sale of goods from the statute of frauds may consist of letters or other writings signed by the party to be bound, and may be aided by reference to other writing constituting a part of the contract, but to be sufficient all the essential elements of the alleged contract must appear therefrom without resort to parol testimony. *Graham v. Henderson Elevator Co.*, 697, 703 (8).
5. *Sufficiency of Memorandum.—Sales of Goods.*—Where the party against whom liability is sought to be enforced has not signed a memorandum containing the essential elements of a contract of sale, but has signed another instrument or writing in which it is claimed such reference is made to the memorandum as to amount to an adoption and acceptance of the terms thereof, such signed instrument, to be sufficient under the statute, must contain a clear and

**FRAUDS, STATUTE OF—Continued.**

definite reference to such memorandum and so identify it as to make its provisions a part of the signed instrument.

*Graham v. Henderson Elevator Co.*, 697, 703 (10).

6. *Sufficiency of Memorandum.—Sales of Goods.*—A letter from defendant dated February 1, asking plaintiff's best offer on 15,000 bushels of corn, a letter from plaintiff dated March 22, referring to conversation of the same day and confirming the purchase of 10,000 bushels of corn to be inspected by plaintiff's agent, and a letter from defendant dated March 25, asking plaintiff to send its agent as soon as weather would permit so that corn could be loaded, did not constitute sufficient memoranda to avoid the statute of frauds, since, unaided by parol evidence, they did not disclose the terms of the alleged sale or warrant the inference that the minds of the contracting parties ever met upon the terms in the letter of March 22. *Graham v. Henderson Elevator Co.*, 697, 702 (7), 707 (7).

**FREIGHT—**

Carriage of, see **CARRIERS** 1-7.

**FREIGHT TRAIN—**

Traveler on, see **CARRIERS** 17-19.

**"FROM TIME TO TIME"—**

See **WORDS AND PHRASES**.

**GAS —**

Oil and, leases, see **MINES AND MINERALS** 5.

**GUARDIAN AND WARD—**

See **LIMITATION OF ACTIONS** 2.

1. *Duty of Guardian.*—Where a guardian purchased the real estate of her wards at an administrator's sale to pay the debts of their father's estate, any advance in the value of such realty inured to the benefit of the wards, and, though the guardian took the title in her own name, she held what she acquired in trust for them, subject only to her right to be reimbursed for what she had invested.  
*Donlon v. Maley*, 25, 27 (1), 29 (1).
2. *Right to Compensation.—Denial of Trust.*—Where a guardian, after acquiring property under circumstances giving rise to a constructive trust in favor of the wards, recognized the right of the wards in the property, was solicitous of the welfare of the wards, and during a long period of time never denied the trust or that an accounting was due from her, but thereafter asserted title and ownership of the property in herself, she could not, when judgment was rendered against her in a suit to declare the trust and for an accounting, claim any compensation for herself or for her attorney for services in management rendered after the time she repudiated the trust, though she was properly allowed for such services prior to such repudiation.  
*Donlon v. Maley*, 25, 31 (7), 33 (7).

**HARMLESS ERROR—**

See **APPEAL** 82; 119-126; **MASTER AND SERVANT** 28.

**HIGHWAYS—**

1. *Improvement.—Assignment of Labor Claims.—Validity.—County Officers.*—Where defendant, who was awarded the contract by the board of county commissioners for the improvement of a highway,



**HIGHWAYS—Continued.**

in lieu of cash issued to the laborers employed in such work orders which they sold and assigned to a certain firm, the assignment of such claims was not invalid as against public policy from the mere fact that one of the members of such firm was also a member of the board of county commissioners.

*Smiley v. State, ex rel.*, 507 513 (4).

2. *Improvement.—Contractor's Bond.—Liability.*—Under the bond of a contractor for the improvement of a public highway, executed pursuant to §7723 Burns 1914, Acts 1905 p. 521, §74, a liability exists for fuel furnished to him and used in crushing stone for the highway and for hauling tools to the place of work, since, though such things do not become a physical portion of the completed road as materials do, they in fact become as much a part of the structure as labor performed upon it. *Smiley v. State, ex rel.*, 507, 512 (3).
3. *Improvement.—Contractor's Bond.—Liability.*—Where a contractor for the improvement of a public highway, on becoming unable to pay his laborers in cash, issued to them orders which they sold and assigned to defendants at a discount, such orders constituted debts of the contractor rendering him liable to defendants on his bond executed pursuant to §7723 Burns 1914, Acts 1905 p. 521, §74, although there would have been no such liability had defendants loaned him the money to pay his laborers, or had assumed to complete the contract for him. *Smiley v. State, ex rel.*, 507, 511 (2).
4. *Improvement.—Contractor's Bond.—Construction.*—The bond of a contractor for the improvement of a public highway, given under §7723 Burns 1914, Acts 1905 p. 521, §74, providing that the contractor "shall pay for any labor or material" that shall have been furnished to him or to any subcontractor, etc., is to be construed as a whole and in connection with the contract to secure the performance of which it was executed, and, thus construed, the bond of a contractor conditioned that he "shall promptly pay all debts incurred by him in the prosecution of said work, including labor, materials furnished," etc., evidenced the intention of the parties to the bond to secure the payment of all labor and material used in the improvement of the road mentioned in the contract, *Smiley v. State, ex rel.*, 507, 510 (1).
5. *Regulation of Use.—Law of the Road.—Negligence.*—While traffic rules of public thoroughfares, whether based on the law of the road, an ordinance or statute, are not inflexible and may be properly disregarded in order to escape from danger to one's self or to prevent injury to others, one can not recover for injuries sustained in his disregard of such rules where the facts disclose no excuse therefor.

*Borg v. Larson*, 514, 518 (3).

**HUSBAND AND WIFE—**

1. *Administrator's Sale of Lands of Deceased Wife.—Jurisdiction.—Rights of Surviving Husband.*—While a circuit court has general jurisdiction to order the sale of lands in proper proceedings, it exceeds its authority in an ordinary case by directing the sale of the lands of a surviving husband to pay the debts of his deceased wife's estate, and such action will not stand as against a direct attack. *Williams v. Wood*, 69, 74 (2).
2. *Administrator's Sale of Lands of Deceased Wife.—Rights of Surviving Husband.*—A surviving husband was properly precluded from recovering in an action against persons claiming under an administrator's sale of his wife's lands, brought to quiet title and for possession of one-third of such land, where it appeared that he was a party to the administrator's petition, and properly served and defaulted, that the court ordered the sale of the wife's land as



**HUSBAND AND WIFE—Continued.**

a whole, including his interest therein, for the payment of the wife's debts, including certain mortgages in which he had joined, and that there was nothing in such petition to show that he as such surviving husband in fact became the owner of any part of the lands of which his wife died the owner. *Williams v. Wood*, 69, 74 (3).

3. *Adultery of Wife.—Evidence.*—A single act of adultery by a wife does not force the conclusion that she was living in adultery within the meaning of §3034 Burns 1914, §2496 R. S. 1881, but the fact that she committed such act under circumstances showing a deep degree of abandonment may be submitted to the jury for consideration in determining her course of life at the time of her husband's death. *Spade v. Hawkins*, 388, 394 (4).
4. *Adultery of Wife.—Evidence.*—Evidence that a wife, after abandoning her husband, gave birth to two illegitimate children, the last of whom was born two years before her husband's death, but which failed to show any improper conduct on her part from the time the last child was born to the time of her husband's death, was insufficient to support a finding against her on the charge that she was living in adultery at the time of her husband's death. *Spade v. Hawkins*, 388, 396 (6).
5. *Adultery of Wife.—Statutes.*—Section 3034 Burns 1914, §2496 R. S. 1881, precluding an adulterous wife from participating in the estate of her deceased husband, contemplates not only a relation wherein the wife after abandoning her husband is found at the time of his death domiciled with a man other than her husband in a state of adultery, but also a status wherein an inclination to adultery is a present element with the purpose and practice of following such inclination to its logical conclusion at convenience and whenever opportunity affords. *Spade v. Hawkins*, 388, 395 (5).
6. *Bills and Notes.—Suretyship of Wife.—Evidence.—Presumptions.*—In an action against a husband and wife on promissory notes, defended by the wife on the ground of suretyship, evidence, though conflicting, showing that she received none of the consideration for which the notes were given, that the loan was negotiated by the husband and that she knew nothing of it until called on to sign the notes, was sufficient to overcome the presumption arising from the face of the notes that they were the joint obligations of defendants, and rendered conclusive the finding that she was surety for her husband. *Standard Brewery v. Lacanski*, 499, 503 (5).
7. *Contracts.—Suretyship of Wife.*—The test of the relationship sustained by a married woman who has joined her husband in the execution of a note is to inquire whether she received in person or in benefit to her property the consideration for which the note was executed. *Standard Brewery v. Lacanski*, 499, 503 (4).
8. *Contracts of Wife.—Action.—Findings.—Review.*—In an action by a married woman to recover possession of certain real estate and to quiet her title thereto, where it appeared from the findings that an agreement had been entered into by plaintiff to furnish defendants money with which to purchase the real estate, the title to which was to be in defendants, in consideration that defendants dispose of their property in Illinois and move to Indiana, that defendants performed their part of the agreement and were put in possession of the lands in dispute, which were purchased with the money furnished by plaintiff under such agreement together with money furnished by defendants, and that plaintiff without defendant's knowledge caused the conveyance to be made to her instead of to defendants, the defendants were the holders of the equitable title and entitled to a decree directing a conveyance to them, notwithstanding plaintiff's contention that the contract was the parol

**HUSBAND AND WIFE—Continued.**

contract of a married woman and therefore incapable of enforcement, since the agreement did not relate to the conveyance of real estate but to plaintiff's furnishing of money, and under §7853 Burns 1914, §5717 R. S. 1881, the contracts of a married woman with reference to her personal property are binding on her.

*Tuell v. Homann*, 285, 291 (4).

9. *Conveyances.—Construction.—Deed to Husband and Wife.*—Where a deed of conveyance to a husband and wife contains words which so qualify or define the estate conveyed as to make it apparent that the parties intended the grantees to hold as tenants in common, such intention will prevail and be given effect.

*Richards v. Richards*, 34, 38 (2).

10. *Conveyances.—Estates Granted.—Deed to Husband and Wife.—Statutes.*—Under the provisions of §§3953, 3954 Burns 1914, §§2922, 2923 R. S. 1881, relative to the estates created by conveyances made to two or more persons, a deed of lands to a husband and wife, containing no qualifying words, conveys an estate to them as tenants by the entirety, even though the grantees are not therein described as being husband and wife.

*Richards v. Richards*, 34, 38 (1).

11. *Deed to Husband and Wife.—Construction.*—The provisions of a deed of land made to a husband and wife, that if the land was not sold by grantees, then at the death of the husband his half of said land should go equally to all his children, and that if the wife had not sold her part at her death, one-half should be divided equally between her children and her husband's children by his first wife, were not repugnant to the granting clause in the sense that they detracted from or lessened the title conveyed to grantees, but showed an intention that the title was to be taken and held by them in common, and not by the entirety, which must prevail as against the granting clause, though the latter, standing alone, would have conveyed an estate by the entirety.

*Richards v. Richards*, 34, 39 (4).

12. *Interest in Estate of Deceased Husband.—Adulterous Wife.—Statutes.*—In order that §3034 Burns 1914, §2496 R. S. 1881, may be invoked to cut off the right of a surviving wife to the one-third interest in fee simple given her by §3014 Burns 1914, §2483 R. S. 1881, in the real estate of her deceased husband, it must appear that she had abandoned her husband and that at the time of his death she was living apart from him in adultery.

*Spade v. Hawkins*, 388, 391 (1).

13. *Interest in Estate of Deceased Husband.—Adulterous Wife.—Findings.—“From Time to Time.”*—A special finding that defendant, a surviving widow, during a certain number of years had been “living from time to time in the practice of adultery with parties whose names are not disclosed by the evidence” could not support a conclusion of law that she was precluded from participating in her husband's estate by virtue of §3034 Burns 1914, §2496 R. S. 1881, since the finding did not compel the inference that she was living in adultery at the time of her husband's death, but was at most a finding that occasionally she was guilty of adultery, the phrase “from time to time” being synonymous with “ocasionally,” “at intervals,” “now and then.”

*Spade v. Hawkins*, 388, 392 (2), 393 (2), 394 (2), 396 (2), 398 (2).

14. *Lands of Deceased Wife.—Rights of Surviving Husband.*—It does not conclusively follow from the fact that a wife dies intestate the owner in fee of certain real estate, and leaving a husband surviv-

**HUSBAND AND WIFE—Continued.**

ing, that he, as such surviving husband, inherits from her any interest in such land. *Williams v. Wood*, 69, 74 (4).

15. *Property Rights of Wife.—Rights to Earnings and Proceeds of Suit.—Statutes.*—Under §§7867, 7868 Burns 1914, §§5130, 5131 R. S. 1881, the earnings and profits of a married woman accruing from her trade, business, services or labor, other than labor for her husband or family, are her sole property, and she may maintain an action in her own name for damages for any injury to her person the same as if she were sole and the money recovered shall be her separate property. *P. B. Arnold Co. v. Buchanan*, 626, 633 (5).

**“ILLNESS”—**

See WORDS AND PHRASES.

**IMPROVEMENTS—**

Recovery for, see EJECTMENT 5, 6.

**INDICTMENT—**

Procuring, see MALICIOUS PROSECUTION 3.

**INFANTS—**

See NEGLIGENCE 9.

**INHERITANCE—**

Right of, see DESCENT AND DISTRIBUTION 2.

**INJUNCTION—**

See EASEMENTS 6–9.

1. *Right to Relief.—Remedy at Law.*—A party is not necessarily precluded from injunctive relief by the fact that he has a remedy at law, since the court may grant such relief where it appears that the legal remedy is not as prompt, practical, efficient and adequate as that afforded by equity.  
*Shedd v. American Maize, etc., Co.*, 146, 182 (18).

**INSTRUCTIONS—**

See TRIAL 7.

**INSURANCE—**

1. *Action on Policy.—Evidence.—Verdict.*—Where the uncontradicted evidence showed that statements in the application material to the risk were untrue, and that the insurer immediately rescinded the contract upon learning of their falsity, and tendered back the premiums received, a verdict for plaintiff in an action on the policy was in conflict with the evidence and not in accord with the principles of law controlling such cases.  
*Supreme Lodge, etc. v. Miller*, 269, 274 (4).
2. *Breach of Warranty.—Pleading.*—An answer alleging the violation by insured of a warranty as to an existing fact, must allege an offer to return the premiums paid.  
*Supreme Lodge, etc. v. Watkins*, 384, 385 (2).
3. *Breach of Warranty.—Avoiding Contract.—Pleading.*—The breach of a promissory warranty, as an agreement of forfeiture of the policy if the insured should use alcoholic liquor to excess, merely renders the policy voidable at the election of the insurer, and an-

**INSURANCE—Continued.**

swers grounded on such a breach must, to be good, show an election to avoid the policy and that no premiums were received after the breach, or, if received, an offer to return the premiums.

*Supreme Lodge, etc. v. Watkins*, 384, 385 (1).

4. *Warranties.—Breach.*—Where it is agreed that the application for insurance shall be a part of the policy, and the statements in such application are warranted to be true, such statements will be deemed to be material, and if they are false there can be no recovery on the policy, regardless of whether they were innocently made or otherwise; and, even where such statements are construed merely as representations, there can be no recovery if they were material to the risk and were untrue.

*Supreme Lodge, etc. v. Miller*, 269, 271 (2).

5. *Warranties.—Breach.—Evidence.*—Where the applicant for a benefit certificate stated in his application that he had never received sick benefits, that he had never been rejected as an applicant for insurance, that there was nothing in his physical condition or personal history tending to impair or shorten his life, that he had suffered no illness not specifically inquired about, and had never had any disease of the abdominal viscera or chronic ulcers, and that he had never consulted a physician, such statements were material to the risk, so that on uncontradicted proof that the statements regarding sick benefits and other insurance were not true a rescission of the contract was warranted, in the absence of a waiver, regardless of whether they be considered as warranties or as representations.

*Supreme Lodge, etc. v. Miller*, 269, 272 (3).

6. *Live Stock Insurance.—Defenses.—Waiver.*—Where a live stock insurance company, with knowledge of all the facts respecting the death of the animal insured, rejected the claim after proof of loss solely upon the ground that the animal had been killed by an officer of the law, it thereby waived all other grounds of defense, including the plaintiff's failure to give notice of the animal's illness.

*National Live Stock Ins. Co. v. Elliott*, 112, 117 (5).

7. *Live Stock Insurance.—Expediting Death of Animal.—Liability.*—Where plaintiff's mare in the foaling of a colt was so badly torn and mangled that she suffered great pain and was in a dying condition, and there was no possibility of recovery, the act of the veterinary surgeon in expediting her death by a blow on the head did not relieve defendant from liability under a policy covering loss by death from foaling.

*National Live Stock Ins. Co. v. Elliott*, 112, 114 (1).

8. *Live Stock Insurance.—“Sickness.”—“Illness.”*—The terms “sickness” and “illness” are practically synonymous and may include a physical disorder of a less serious character than a disease, but as used in insurance contracts they denote a disease or ailment of such character as to affect the general soundness and health of the system of the subject involved, and not a mere temporary indisposition which does not tend to undermine and weaken the constitution.

*National Live Stock Ins. Co. v. Bartlow*, 233, 237 (2).

9. *Live Stock Insurance.—Notice of Illness.*—Under a policy of live stock insurance requiring notice to the company in case of illness of the animal insured, the owner of the animal has a reasonable time within which to give such notice, and where the facts are disputed the question of what constitutes a reasonable time is for the jury; hence where plaintiff's mare in foaling was so badly torn and mangled that she was beyond the possibility of recovery and was suffering intensely, so that humane treatment required the immediate expediting of death, the court can not say that the failure to notify the company of the animal's illness was unreasonable.

*National Live Stock Ins. Co. v. Elliott*, 112, 116 (4).

**INSURANCE—Continued.**

10. *Live Stock Insurance.—Action on Policy.—Interrogation of Party Before Trial.—Conclusiveness of Answer.*—In an action on a policy of live stock insurance exempting the company from liability for death of an animal pursuant to official authority or direction, plaintiff's answer to an interrogatory propounded before trial, that the animal was killed by an officer of the law, was not conclusive and was subject to contradiction by evidence showing that the officer did not act in an official capacity and that what he did was merely to expedite the death of the animal whose condition was already beyond the possibility of recovery.

*National Live Stock Ins. Co. v. Elliott*, 112, 116 (3).

11. *Live Stock Insurance.—Death of Animal.—Official Acts.—Liability.*—Defendant was liable for the death of a mare covered by a policy providing that no liability should attach for death caused by the authority or direction of an officer or person claiming to act under and by virtue of any law, where, on finding the mare to be suffering and in a dying condition beyond the possibility of recovery, the veterinary in charge, who was also an officer of the law, expedited her death by a blow on the head, in the absence of anything to show that he was acting in his official capacity rather than in the performance of his duty as a veterinary.

*National Live Stock Ins. Co. v. Elliott*, 112, 116 (2).

12. *Live Stock Insurance.—Notice of Sickness.—Liability.*—A policy of live stock insurance providing that the company should not be liable in case of the death of the animal from sickness if the assured failed to render at once notice to the secretary of the company of such sickness, though perhaps not requiring it in all cases, plainly contemplated that notice be given before the decease of the animal, and the assured could not recover in an action thereon where the animal insured became sick in the evening of one day and died in the morning of the second day following, and the assured, though having opportunity to do so, failed to notify the company of such sickness.

*National Live Stock Ins. Co. v. Bartlow*, 233, 238 (4).

13. *Live Stock Insurance.—Notice of Sickness.—Duty of Assured.—“At Once.”*—While a stricter rule of construction is to be enforced against assured under a policy of live stock insurance calling for notice to the company at once of the sickness of the animal, than is applied in cases requiring information of a past illness, such a policy does not necessitate instantaneous action on the part of the assured, but requires that he act from the viewpoint of the reasonably possible termination of the illness involved, the requirement for notice “at once” meaning that notice shall be given within such time as is reasonable in view of the circumstances.

*National Live Stock Ins. Co. v. Bartlow*, 233, 238 (3).

14. *Live Stock Insurance.—Construction of Contract.—Notice of Sickness.*—The provision of a policy of live stock insurance that the company would not be liable for loss occurring by the death of the animal from sickness if the assured failed to render at once notice to the secretary of the company of such sickness, should be reasonably construed so as not to require notice of a mere temporary and inconsequential indisposition bearing no relation to the prospective health or continued existence of the animal, and as not to require notice simultaneous with the manifestation of the physical disorder, and regardless of attending circumstances.

*National Live Stock Ins. Co. v. Bartlow*, 233, 237 (1).

**“INTENTIONALLY”—**

See WORDS AND PHRASES.

**INTERFERENCES—**

See EASEMENTS 7-9.

**INTERLOCUTORY ORDER—**

Appeal from an, is in the Supreme Court only, see APPEAL 1.

**INTERROGATORIES—**

Calling for a conclusion of law should not be submitted, see TRIAL 2.

**INTOXICATING LIQUORS—**

1. *Elections.—Dismissal of Petition.—Appeal from Order of Board of Commissioners.*—The order of a board of county commissioners dismissing a petition filed before it praying for an election upon the question of whether the sale of intoxicating liquors as a beverage shall be prohibited, instead of ordering the election as provided for in §8316 Burns 1914, Acts 1911 p. 363, is a judicial act from which an appeal will lie in favor of any one aggrieved by such order.  
*Cushman v. Hussey*, 464, 466 (1).

**JUDGES—**

1. *Special Judges.—Appointment.—Waiver of Objections.*—As a general rule all objections to the appointment of a special judge are waived if not made at the time of the appointment, except where the complaining party was not brought into the case until after the action is taken, but in such event the objection of such party is not available unless made upon his first appearance.  
*Pottlitzer v. Citizens Trust Co.*, 45, 59 (2).
2. *Special Judges.—Appointment.*—The record relating to the appointment of a special judge showing that the regular judge, being interested in the cause, by agreement of the parties appointed such special judge, who took the oath of office and assumed jurisdiction, affirmatively discloses that such special judge obtained jurisdiction of the cause in the manner provided by §427 Burns 1914, Acts 1907 p. 108.  
*Pottlitzer v. Citizens Trust Co.*, 45, 59 (1).
3. *Special Judge.—Authority.—Jurisdiction of Regular Judge.*—Where a special judge was regularly appointed and qualified and assumed jurisdiction in a receivership case, he acquired full authority over the case throughout all its stages to the exclusion of that of the regular judge, and, in the absence of a showing that the special judge was incapacitated or refused to act, the regular judge was without authority to receive a petition to intervene in the case. (*Hadley v. Lake Erie, etc., R. Co.* [1899], 21 Ind. App. 675; and *Chicago, etc., R. Co. v. Cunningham* [1904], 33 Ind. App. 145, distinguished.)  
*Pottlitzer v. Citizens Trust Co.*, 45, 63 (9)

**JUDGMENT—**

Appealable, see APPEAL 5.

Appeal from, ordering local option election, see APPEAL 13.

From which appeal will lie, see ABATEMENT.

On pleading, see PLEADING 3.

1. *Arrest of Judgment.*—Generally a judgment will not be arrested if there is one good count to which the verdict can be applied.  
*Pillsbury, etc., Co. v. Walsh*, 76, 89 (9), 90 (9).
2. *Arrest of Judgment.*—The only order or judgment necessary where a motion in arrest is sustained is an order arresting the judgment, and in such event each party pays his own costs and the plaintiff may proceed *de novo* in a fresh action.  
*Pillsbury, etc., Co. v. Walsh*, 76, 82 (1).



**JUDGMENT—Continued.**

3. *Arrest of Judgment.*—The power to arrest a judgment is inherent in all courts of general common-law jurisdiction, and the exercise of such power is a means by which the court or judge refuses to give a judgment in a cause, though it be regularly decided, where it appears either that no cause of action exists, that the cause of action is not set forth with precision or accuracy, or that a judgment rendered in favor of the prevailing party would be erroneous or reversible; and the motion for arrest is in the nature of a demurrer to the facts of the whole case as presented by the record, exclusive of the evidence given on the trial, and is an appeal to the law for want of some essential without which a judgment thereon would be erroneous. *Pillsbury, etc., Co. v. Walsh*, 76, 88 (8).
4. *Collateral Attack.*—*United States Courts.*—*Jurisdiction.*—Where the United States Circuit Court disregarded an intervening petition in a receivership proceeding, setting up a claim to certain funds derived from property sold, and ordered the receiver to forthwith pay such funds to a creditor, the State court can not entertain a proceeding to declare that such intervening petitioner has a superior lien on the fund in the hands of such creditor, since such proceeding is a collateral attack on the judgment of the federal court. *Fidler v. Gilchrist*, 363 (1).
5. *Conclusiveness.*—*United States Courts.*—Judgments and decrees of the Circuit Court of the United States, sitting in a particular state, are to be accorded such effect in the courts of that state, as would be accorded in similar circumstances to the judgments and decrees of state tribunals of equal authority. *Fidler v. Gilchrist*, 363, 365 (3).
6. *Relief.*—*Forum.*—One who seeks relief from a judgment alleged to have been procured by fraud, mistake or collusion, must seek it by proper proceeding in the court where rendered, or by appeal. *Fidler v. Gilchrist*, 363, 365 (2).

**JUDICIAL KNOWLEDGE—**

See EVIDENCE 7, 8.

**JUDICIAL SALES—**

See STATUTES 2.

**JURISDICTION—**

See DIVORCE 4; HUSBAND AND WIFE 1; JUSTICES OF THE PEACE 1–3.  
 Of United States Courts, see JUDGMENT 4.  
 Of an appeal from an interlocutory order is in the Supreme Court, see APPEAL 1.  
 Of regular judge when special judge has qualified and assumed jurisdiction, see JUDGES 3.

**JURY—**

Province of, see TRIAL 6.

**JUSTICES OF THE PEACE—**

1. *Jurisdiction.*—*How Determined.*—The amount declared or demanded, and not the amount due, determines the question of whether a justice of the peace has jurisdiction of the subject-matter of an action under §1721 Burns 1914, §1433 R. S. 1881. *Ward v. Perry*, 1, 3 (2).
2. *Jurisdiction.*—*Dismissal.*—In view of §1721 Burns 1914, §1433 R. S. 1881, limiting the jurisdiction of justices of the peace in ac-



**JUSTICES OF THE PEACE—Continued.**

tions on contracts or torts to cases where the amount demanded does not exceed \$200, a circuit or superior court can acquire no jurisdiction on appeal from the judgment of a justice of the peace in an action where the amount demanded exceeds \$200, and should dismiss the appeal.

*Ward v. Perry*, 1, 3 (1).

3. *Jurisdiction*.—Where the complaint in an action before a justice of the peace was in three paragraphs, in each of which the recovery of an unliquidated claim was sought, and in the last of which the amount claimed by virtue of the causes alleged in all the paragraphs was restricted to \$200, the justice had jurisdiction of the subject-matter, notwithstanding the amount of damages alleged in each paragraph, when combined, exceeded the amount fixed as the limit of jurisdiction by §1721 Burns 1914, §1433 R. S. 1881.

*Ward v. Perry*, 1, 6 (3).

**JUSTIFICATION—**

See **CONVERSION** 2.

**KNOWLEDGE—**

Of defect, see **MASTER AND SERVANT** 8-10.

**LACHES—**

See **RECEIVERS** 6.

**LANDLORD AND TENANT—**

1. *Default in Payment of Rent.—Notice to Vacate.—Extension of Tenancy*.—A notice given to a tenant on default in payment of rent, expressly notifying the tenant to deliver up the possession at the expiration of ten days from the time of receiving the notice, "unless the rent now due is paid within said time," operates to waive any right which the landlord may have to immediate possession by reason of such default, and extends both the time of payment and the tenancy for a period of ten days.

*P. B. Arnold Co. v. Buchanan*, 626, 632 (3).

2. *Tenant's Right to Possession.—Default in Payment of Rent*.—Where a tenant makes proper effort to pay rent at the time and place when due, but is prevented from doing so by the acts and conduct of the landlord, such default does not deprive the tenant of the right to the possession of the rented premises.

*P. B. Arnold Co. v. Buchanan*, 626, 631 (2).

3. *Use of Premises.—Injuries from Dangerous Condition.—Action.—Instruction*.—In a tenant's action for personal injuries from a defect in the rented premises, an instruction that the averments in the complaint descriptive of the injuries were material averments, but that it was not necessary for plaintiff to prove all such averments as to injury if any of the injuries were proved by a preponderance of the evidence, was not objectionable as failing to inform the jury what elements were necessary to be made out, since it was directed solely to the subject of the necessity of proving all the averments on the subject of injury, and in that respect stated the law correctly.

*P. B. Arnold Co. v. Buchanan*, 626, 629 (1).

**LAST CLEAR CHANCE—**

See **NEGLIGENCE** 4, 10, 12; **RAILROADS** 15-17.

**LEASES—**

See **MINES AND MINERALS** 1-5.

**LETTERS—**

See **CONTRACTS** 3.

**LIMITATION OF ACTIONS—**

1. *Disaffirmance of Trust.*—The filing of a final report by a guardian did not start the statute of limitations to running against the wards in so far as it operated as a disaffirmance of the constructive trust which arose out of the guardian's purchase of the wards' property at an administrator's sale to pay the debts of their father's estate, where it appeared that thereafter the guardian advanced money to such wards and represented to them that it was obtained from the income of the property, and that she would make a final accounting at a later date. *Donlon v. Maley*, 25, 29 (3).
2. *Guardian and Ward.—Breach of Trust.*—In an action to enforce a constructive trust as to property purchased by the guardian of plaintiffs at a sale held by the administrator of the estate of plaintiffs' father, the claims of plaintiffs were not barred by the six-year statute of limitation, and could only be barred by the fifteen-year statute. *Donlon v. Maley*, 25, 29 (2).

**LIVE STOCK—**

Carriage of, see **CARRIERS** 8-14.

**LIVE STOCK INSURANCE—**

See **INSURANCE** 6-14.

**LOCAL OPTION ELECTION—**

Appeal by taxpayer from judgment ordering, see **APPEAL** 13.

**MALICIOUS PROSECUTION—**

1. *Action.—Essential Elements.—Prosecution by Indictment.*—To entitle plaintiff to recover in an action for malicious prosecution, where the prosecution complained of was commenced by indictment, the return of the indictment must be shown and it must be made to appear that defendant instigated or procured and caused the return of the indictment, and that the prosecution was without probable cause, was malicious, and was terminated by the discharge of plaintiff. *Johnson v. Brady*, 556, 559 (3).
2. *Action for Prosecution by Indictment.—Evidence.—Sufficiency.*—In an action for malicious prosecution commenced against the plaintiff by grand jury indictment, evidence showing a dispute involving the ownership of corn fodder and that at the time of such dispute defendant threatened to submit the matter to the grand jury, that almost a year thereafter a grand jury investigation was begun which resulted in the indictment of plaintiff for grand larceny, but not showing that defendant had anything to do with actually instituting or beginning the prosecution, or that he had any knowledge that it was to be begun, or that he was in any way voluntarily connected therewith, was insufficient to support a verdict for plaintiff. *Johnson v. Brady*, 556, 559 (4), 564 (4).
3. *Liability.—Procuring Indictment.*—While defendant in an action for malicious prosecution may be liable, though he was not the originator of the proceedings complained of, if he voluntarily participated in and countenanced and approved the prosecution, his mere acquiescence would not make him liable, and it must be shown that he did some affirmative act in connection with such prosecution. *Johnson v. Brady*, 556, 564 (6).

**MALICIOUS PROSECUTION—Continued.**

4. *Parties.—Joint and Several Liability.*—All persons concerned in originating and carrying on a malicious prosecution are jointly and severally liable in an action to recover damages therefor.  
*Johnson v. Brady*, 556, 564 (5).

**MASTERIAL DUTY—**

See MASTER AND SERVANT 4-6, 32, 39.

**MATERIALMEN—**

See MECHANICS' LIENS.

**MASTER AND SERVANT—**

1. *Assumption of Risk.—Inspection.—Contract.*—Where one employed as a lineman is required by his contract to make an inspection of the poles, etc., he can not recover for injuries resulting from his failure to properly inspect.  
*Walling v. Terre Haute, etc., Traction Co.*, 607, 613 (5).
2. *Assumption of Risk.—Inspection.—Lineman.*—Where the employer has provided an independent system of inspection, one employed as a lineman does not assume the risks that are not obvious to the ordinary use of the senses, and that could have been discovered by reasonable inspection, nor does he, in the absence of duty to inspect devolving on him, assume risks of which he has no actual or constructive knowledge.  
*Walling v. Terre Haute, etc., Traction Co.*, 607, 612 (4).
3. *Assumption of Risk.—Inspection.—Lineman.*—While the rule of safe place applies in favor of one employed as a lineman, the general rule that the employe assumes the incidental and obvious risks of the service also applies, so that where the employer has no independent system of inspection, and the lineman is not so inexperienced as to be entitled to instruction, and has no reason to believe that an inspection has been made, the latter must make such tests himself as may be necessary to ascertain whether it is safe to proceed with his work, and can not hold the employer liable unless his injuries result from a defect existing in the poles, cross-arms, etc., when they were originally placed in position, or unless the employer had some knowledge of the defect which was not communicated to him.  
*Walling v. Terre Haute, etc., Traction Co.*, 607, 611 (3).
4. *Assumption of Risk.—Change of Employment.—Hidden Dangers.—Masterial Duty.*—Where a servant is transferred from his regular employment and required to perform work involving risks not ordinarily incident to the employment of which he has no knowledge, and which would not have been contemplated or assumed by one originally employed at such work, it is the duty of the master, having knowledge of such dangers, to disclose them to the servant, and the latter will not be held to have assumed the risk of dangers unknown to him and not discoverable by him in the exercise of ordinary care.  
*Marietta Glass Mfg. Co. v. Bennett*, 435, 444 (5).
5. *Assumption of Risk.—Temporary Change of Employment.—Masterial Duty.—Liability.*—Where the master orders a servant temporarily to do other work, involving different or greater dangers than those incident to the work within the scope of his employment, the servant does not by reason of the implication arising from the contract of employment assume the risk incident to such temporary work, and on assuming the latter duties the master must, if the servant is inexperienced, warn and instruct him, and

**MASTER AND SERVANT—Continued.**

the master's failure in this respect, if resulting in injury to the servant, renders him liable.

*Marietta Glass Mfg. Co. v. Bennett*, 435, 443 (3).

6. *Inexperienced Servant.—Masterial Duty.*—It is the duty of the master, before exposing an inexperienced servant to the hazards of a dangerous service, to warn him and give him such instructions as will enable him to avoid injury, unless both the danger and the means of avoiding it are apparent.

*Marietta Glass Mfg. Co. v. Bennett*, 435, 442 (2).

7. *Injuries to Servant.—Assumed Risk.*—A servant of mature years of ordinary intelligence, and in full possession of all his faculties, must exercise his natural senses for his own safety, and if he is derelict in duty in this respect he can not recover for injuries received.

*Cincinnati Gas, etc., Co. v. Underwood*, 351, 357 (4).

8. *Injuries to Servant.—Assumption of Risk.—Knowledge of Defect.*—At common law an employe continuing in the service of the master, after notice of a defect augmenting the danger of the service, assumes the risk as increased by the defect, unless the master expressly or impliedly promises to remedy the defect.

*National Motor, etc., Co. v. Pake*, 366, 372 (4).

9. *Injuries to Servant.—Assumption of Risk.—Knowledge of Defect.*—A servant is not necessarily to be charged with assumption of the risks growing out of a defect of which he had knowledge, or of which by the exercise of ordinary care he could have known, since, by reason of ignorance or want of experience, the risks and hazards may not have been so open and apparent as to be appreciated by him.

*Marietta Glass Mfg. Co. v. Bennett*, 435, 446 (6).

10. *Injuries to Servant.—Assumption of Risk.—Knowledge of Servant.*—Under a complaint disclosing that plaintiff, who was employed as a lineman to repair defective and damaged wires along defendant's electric railroad, had been in defendant's employ some time before the accident in that line of work, and that he understood the particular work, and had full knowledge of the situation and condition of the car from the top of which he did his work, the plaintiff must be deemed to have assumed the risk from the uneven roof of the car.

*Walling v. Terre Haute, etc., Traction Co.*, 607, 610 (2).

11. *Injuries to Servant.—Assumption of Risk.—Choice of Unsafe Way.*—The doctrine of assumed risk does not obtain in an action brought under the statute for injuries to a servant, so that a plaintiff is not necessarily precluded from recovery merely because he knowingly and voluntarily chose the more unsafe of two ways in doing his work, but it is for the jury to determine whether the danger was such that a person of ordinary prudence might reasonably have believed that it could be safely encountered by the exercise of proper caution.

*Benkowski v. Sanders & Egbert Co.*, 374, 378 (3).

12. *Injuries to Servant.—Assumption of Risk.—Contributory Negligence.—Burden of Proof.—Statutes.*—Under the act of March 2, 1911 (Acts 1911 p. 145, §§8020a-8020k Burns 1914), where negligence of the employer is shown, the defense of assumption of risk and of contributory negligence, because of dangers and hazards inherent in the employment, are removed, and the burden of proving that the employer did not know of the defect alleged to constitute negligence, or was not chargeable with knowledge, is placed on the employer.

*Deer v. Suckow Co.*, 277, 280 (2).

13. *Injuries to Servant.—Assumption of Risk.—Contributory Negligence.—Statutes.*—Under §8020c Burns 1914, Acts 1911 p. 145,

**MASTER AND SERVANT—Continued.**

§3, where plaintiff employe has proved the defect alleged he has made a *prima facie* case of negligence against the employer, and can not be charged with assumption of the risk in the absence of proof that the employer did not know of the defect, or was not chargeable with constructive knowledge thereof; nor is the employe chargeable with contributory negligence because of a risk inherent in the employment, even though having knowledge thereof; hence in an action under the statute, the court erred in instructing the jury that plaintiff assumed the ordinary risks of the employment and that he could not recover if he knew or could have known of the defect complained of. *Deer v. Suckow Co.*, 277, 281 (3).

14. *Injuries to Servant.—Assumption of Risk.—Instructions.*—An instruction stating that generally a servant assumes all the ordinary risks incident to his employment, and those which are open and obvious and can be seen and appreciated by a person of ordinary intelligence, but that he does not assume the extraordinary risks of which he is ignorant and which are not obvious and open to the observation and which can not be readily seen and appreciated by a person of ordinary intelligence, and that if it was found that the danger encountered by the plaintiff in his work of carrying and handling glass was extraordinary and not open and obvious and could not have been readily seen and appreciated by a person of ordinary intelligence the plaintiff did not assume the risk so as to preclude recovery, was not misleading, and though omitting the question of actual knowledge, was harmless in view of express findings that plaintiff did not know of the dangers of handling glass and that such ignorance was due to lack of experience.

*Marietta Glass Mfg. Co. v. Bennett*, 435, 448 (9).

15. *Injuries to Servant.—Change of Employment.—Assumption of Risk.*—A servant, though assuming the risks ordinarily incident to the work for which he was employed, on being temporarily transferred to work involving different or greater dangers than those incident to the work covered by his employment, does not necessarily assume the risks incident to such other work.

*American Steel, etc., Co. v. Carbone*, 484, 492 (5).

16. *Injuries to Servant.—Change of Employment.—Assumption of Risk.—Contributory Negligence.*—Where a servant is ordered to do work not contemplated by his employment, and which involves hazards equally apparent to the master and the servant, he is not necessarily barred from recovering for injuries resulting from such hazards while obeying such order, either on the theory of assumed risk or of contributory negligence.

*American Steel, etc., Co. v. Carbone*, 484, 492 (6).

17. *Injuries to Servant.—Change of Employment.—Assumption of Risk.—Contributory Negligence.—Jury Questions.*—Where a servant is directed to perform work not contemplated by his employment and not usually performed by him, it is a question of fact for the jury to determine from the evidence whether, in obeying such direction he assumed the risks incident, or whether he was guilty of contributory negligence.

*American Steel, etc., Co. v. Carbone*, 484, 495 (7).

18. *Injuries to Servant.—Change of Employment.—Assumption of Risk.—Instructions.*—In an action for injuries to a servant who had been taken from his regular employment and directed to assist in carrying and handling glass, an instruction stating that if it was found that plaintiff was directed by defendant to carry and handle glass and that such glass was rotten, defective and unusually brittle, dangerous and liable to break in handling, of which facts the defendant knew or should have known, and that the plaintiff

**MASTER AND SERVANT—Continued.**

was ignorant thereof and had no notice or warning, and that while plaintiff was carrying and handling said glass and using due care said glass broke on account of its rotten, defective and unusually brittle condition, and injured plaintiff as alleged, the defendant would be liable, was not objectionable in omitting the question of defendant's knowledge of plaintiff's alleged ignorance.

*Marietta Glass Mfg. Co. v. Bennett*, 435, 449 (10).

19. *Injuries to Servant.—Change of Employment.—Verdict.—Answers to Interrogatories.*—Where plaintiff, originally employed to operate a power-driven chipping machine in a steel mill, sought recovery for injury to his eye, received while temporarily assisting at the work of "flogging" castings, on the theory that the latter work involved greater hazards and that he was inexperienced therewith, answers by the jury to interrogatories showing that in a general way "flogging" was quite similar to "chipping," except that "flogging" a casting was performed by two men instead of one and that the pieces cut or knocked off the casting were heavier and more liable to fly off, that though plaintiff was familiar with the duties of a "flogger" he had no practical knowledge of the work, and that he was temporarily performing work as a "flogger" at the time of his injury pursuant to an order to do so, accompanied by a threat of discharge for refusal to obey, did not show conclusively that plaintiff knew and appreciated the dangers of the work of "flogging," and were not in irreconcilable conflict with the general verdict.

*American Steel, etc., Co. v. Carbone*, 484, 489 (3), 491 (3).

20. *Injuries to Servant.—Inexperienced Servant.—Temporary Change of Employment.—Complaint.*—Where it was reasonably clear that each paragraph of complaint, when considered in its entirety, proceeded on the theory that plaintiff was taken from his regular employment and required to perform work in the performance of which he had no previous experience, and which exposed him to dangers of which he was wholly ignorant, and that defendant failed to warn or instruct him as to such new dangers, etc., neither paragraph was objectionable on the theory that the allegation that plaintiff was "transferred" to such new employment means that the change was permanent and contradicts the idea that plaintiff was injured while temporarily performing work not connected with his regular employment, and especially was the objection untenable in view of other allegations showing that by such transfer plaintiff was exposed to unusual dangers not ordinarily incident to such new work.

*Marietta Glass Mfg. Co. v. Bennett*, 435, 443 (4), 446 (4).

21. *Injuries to Servant.—Complaint.—Theory.—Instruction.*—Where the complaint in a servant's action for personal injuries did not aver that the servant had no knowledge of the defect complained of, but disclosed that he did have knowledge and relied on the master's promise to repair, it must be deemed as proceeding on the theory of a promise to repair and a failure to do so, so that an instruction to the jury stating the masterial duty of providing safe tools and appliances, and to continuously exercise reasonable care to ascertain the condition of machinery and appliances furnished, etc., was outside the issues and fatally erroneous.

*National Motor, etc., Co. v. Pake*, 366, 370 (3), 372 (3), 373 (3).

22. *Injuries to Servant.—Contributory Negligence.—Apparent Hazards.—Statutes.*—The Employer's Liability Act of 1911 (Acts 1911 p. 145, §§8020b, 8020c Burns 1914), applies to any person, firm or corporation employing five or more persons, and under



**MASTER AND SERVANT—Continued.**

its provisions an employe may not be charged with contributory negligence which will defeat his recovery, by reason of dangers or hazards inherent or apparent in his employment.

*Benkowski v. Sanders & Egbert Co.*, 374, 376 (1).

23. *Injuries to Servant.—Contributory Negligence.—Statutes.—Instructions.*—In a servant's action for personal injuries, controlled by the Employer's Liability Act (Acts 1911 p. 145, §§8020b, 8020c Burns 1914), an instruction stating the master's duty to furnish proper appliances, etc., and that plaintiff was not chargeable with contributory negligence to the degree that a recovery on his part would be defeated, because he used a defective appliance furnished, even though the dangers and hazards incident to the use of such appliance were inherent and apparent to him, correctly stated the law, and its refusal was reversible error in the absence of any other instruction covering the subject-matter.

*Benkowski v. Sanders & Egbert Co.*, 374, 376 (2).

24. *Injuries to Servant.—Damages.—Evidence.—Earning Capacity.*—In a servant's action for personal injuries proof of plaintiff's ability to earn money before his injury need not be confined to the particular work he was doing when injured.

*Marietta Glass Mfg. Co. v. Bennett*, 435, 453 (17).

25. *Injuries to Servant.—Defective Conditions.—Inspection by Servant.—Instructions.*—In an action under the statute, an instruction that plaintiff could not recover if the dangerous condition could have been seen by decedent, and stating that defendant was under no greater obligation to use care for the safety of decedent than he was to care for himself, was erroneous, since even at common law a servant is not bound to make a critical examination of a tool or appliance, or of his working place, before using it, and there is a duty of inspection devolving upon the master that is not required of the servant.

*Deer v. Suckow Co.*, 277, 283 (5).

26. *Injuries to Servant.—Defective Place of Work.—Fellow Servants.*—Assuming that an employe of defendant, while engaged in the erection of a scaffold was performing work incident to his employment so as to make him a fellow servant of plaintiff who was subsequently injured by the collapse of such scaffold, due to defective materials used in the construction, negligence of such employe in the construction of the scaffold would not exempt defendant from liability, since it was defendant's duty to furnish proper materials and its failure in this respect was negligence concurring with that of the fellow servant in producing the injury.

*Cincinnati Gas, etc., Co. v. Underwood*, 351, 360 (6).

27. *Injuries to Servant.—Evidence.—Verdict.*—Evidence disclosing that plaintiff was hired by defendant's foreman in charge of its sand boat and gravel plant as a fireman and workman, that such foreman, pursuant to directions from defendant erected a scaffold in a sand crib out of such material as he had on hand, that plaintiff knew nothing of the scaffold until he was directed to assist in repairing a screen in the sand crib, in the doing of which he was required to go upon the scaffold, and that the scaffold was constructed of defective and improper material, so that it gave way and precipitated plaintiff to the ground, producing the injuries complained of, was sufficient to sustain a verdict for plaintiff in an action against the master for such injuries.

*Cincinnati Gas, etc., Co. v. Underwood*, 351, 356 (3).

28. *Injuries to Servant.—Harmless Error.—Instructions.*—In a servant's action for personal injuries sustained in handling glass, an instruction that plaintiff was entitled to recover if the injuries were directly or proximately caused by the negligence complained of, un-



**MASTER AND SERVANT—Continued.**

less it was found that he was guilty of contributory negligence, though failing to mention assumption of risk, was harmless, in view of the findings of the jury in answer to interrogatories, and in view of the fact that the negligence charged was such that to make proof thereof plaintiff was required to show a state of facts necessarily relieving him from assumption of risk.

*Marietta Glass Mfg. Co. v. Bennett*, 435, 447 (8).

- 29.—*Injuries to Servant.—Instructions.—Form.*—An instruction that plaintiff had a "perfect" right to presume that the equipment and appliances were reasonably safe, was not rendered erroneous by the use of the word "perfect."

*Cincinnati Gas, etc., Co. v. Underwood*, 351, 362 (9).

30. *Injuries to Servant.—Instructions.—Review.*—Where defendant had actual notice that there was generally a bad condition of things about plaintiff's place of employment, and gave to its foreman specific directions to do the best he could in building a scaffold with the materials at hand, etc., defendant's objection to instructions, in an action for injuries to plaintiff by the collapse of the scaffold, on the theory that defendant was not charged with any duty with respect to the condition of the working place, etc., was untenable.

*Cincinnati Gas, etc., Co. v. Underwood*, 351, 361 (8).

31. *Injuries to Servant.—Lineman.—Complaint.—Defects in Ways and Works.*—In an action for injuries to one employed as a line-man to repair defective and damaged wires, etc., along defendant's electric railway, a complaint alleging that, plaintiff's injuries resulted from the breaking of a hanger which caused him to fall from the car on which he was standing, and alleging that the hanger was bent and defective, that it broke by reason of long use, defective condition and failure to inspect, that defendant knew of the defective and worn hangers along its line, but that plaintiff was ignorant of such defects and was not warned, and that he had nothing to do with the construction, placement and maintenance of hangers, and had no cause or reason to apprehend the breaking of the particular hanger, etc., and disclosing nothing to show a duty on plaintiff's part to inspect, was sufficient on demurrer.

*Walling v. Terre Haute, etc., Traction Co.*, 607, 613 (6).

32. *Injuries to Servant.—Masterial Duty.—Safe Place to Work.—Complaint.*—In a servant's action for injuries caused by the falling of a scaffold used in connection with the operation of a sand crib, a complaint alleging facts showing that it was defendant's duty to furnish plaintiff a safe place to work, and that defendant failed to discharge such duty, whereby the injuries complained of resulted to plaintiff, was sufficient to withstand a demurrer.

*Cincinnati Gas, etc., Co. v. Underwood*, 351, 355 (1).

33. *Injuries to Servant.—Obedience to Specific Command.—Assumption of Risk.*—A servant may obey a specific command of the master and go into a dangerous place and perform a dangerous task without assuming the risk, unless the apparent danger is such as to deter a man of ordinary prudence from encountering it.

*Marietta Glass Mfg. Co. v. Bennett*, 435, 450 (11).

34. *Injuries to Servant.—Safe Place of Work.—Instructions.*—In an action for injuries to a servant by the collapse of a scaffold, an instruction that defendant was required to furnish plaintiff a reasonably safe place of work, and was bound to continuously exercise ordinary care to ascertain the condition of equipment and appliances, and was chargeable with notice that equipment and appliances would deteriorate and wear, as well as with notice of any defect ascertainable in the exercise of ordinary care, and was required

**MASTER AND SERVANT—Continued.**

to keep equipment and appliances in a reasonably safe condition, was a correct statement of the law and not misleading.

*Cincinnati Gas, etc., Co. v. Underwood*, 351, 360 (7).

35. *Injuries to Servant.—Safe Place of Work.—Vice Principals.—Evidence.*—In an action for injuries to a servant by the collapse of a scaffold erected in a sand pit, where there was evidence showing that the scaffold was erected pursuant to directions from defendant to use such materials as were at hand, by an employe of defendant who had authority to direct the men and was the only person about the premises with authority to direct the work, the verdict for plaintiff was not contrary to law, since the evidence warranted the finding that such employe, in the construction of the scaffold, was a vice principal in charge of the master's work; it being the duty of the master, which he can not delegate so as to avoid liability, to use ordinary care to provide a reasonably safe working place for the servant, and also to furnish suitable and proper materials necessarily required to keep it safe.

*Cincinnati Gas, etc., Co. v. Underwood*, 351, 358 (5).

36. *Injuries to Servant.—Verdict.—Answers to Interrogatories.*—Where the complaint in a servant's action for personal injuries proceeded on the theory that the servant continued in the employ of the master after he had knowledge that the spindle on a machine used by him was defective, on the promise of the master to put in a new spindle, a general verdict for plaintiff, while including a finding that there was a promise to put in a new spindle and a failure so to do, was not overcome by answers to interrogatories returned by the jury disclosing that the promise was to repair the spindle, since the conflict was not irreconcilable.

*National Motor, etc., Co. v. Pake*, 366, 369 (2).

37. *Injuries to Servant.—Verdict.—Answers to Interrogatories.*—Where the issues tendered by the complaint in a servant's action for injuries sustained while working in a glass factory were such that a general verdict thereon amounted to a finding that the glass plaintiff was required to handle was extremely rotten and brittle, which was a condition not ordinarily incident thereto, and that he was required to handle it under conditions of temperature that made it unusually liable to break, answers to interrogatories returned by the jury showing that plaintiff was of mature age and had ordinary intelligence and knew that glass would break and that its edges would cut, etc., but from which it appeared that plaintiff lacked knowledge and experience with respect to handling glass and the dangers incident thereto, were not inconsistent with such general verdict.

*Marietta Glass Mfg. Co. v. Bennett*, 435, 446 (7).

38. *Liability for Injuries.—Statutes.*—Neither §8020b Burns 1914, Acts 1911 p. 145, nor §3862d Burns 1914, Acts 1911 p. 597, as applicable to an action for injuries to a servant by reason of the defective condition of an appliance furnished by the master, changes the common law with reference to the employer's liability, except that where negligence of the employer has been shown the defenses of assumption of risk, and of contributory negligence because of dangers and hazards inherent in the employment, are removed, and the burden of showing that the employer did not know of the defect, or was not chargeable with knowledge, and of proving contributory negligence, is placed on the employer.

*Benkowski v. Sanders & Egbert Co.*, 374, 381 (6).

39. *Masterial Duty.—Safe Place to Work.*—The master must use or-

**MASTER AND SERVANT—Continued.**

ordinary care in providing his employes with a reasonably safe place in which to work.

*Walling v. Terre Haute, etc., Traction Co.*, 607, 610 (1).

40.—*Negligence.—Statutory Duties.*—Where the statute imposes a specific duty on the employer, his breach thereof constitutes negligence, but a somewhat different rule applies where duty imposed is merely general. *Benkowski v. Sanders & Egbert Co.*, 374, 380 (5).

41. *Safety of Appliances.—Duty of Inspection.—Statutes.*—While certain provisions of the Employer's Liability Act of 1911 impose specific duties on persons engaged in the construction of buildings, to provide specific appliances for the protection of employes, §4 of the act (Acts 1911 p. 597, §3862d Burns 1914) requiring employers to see and require that all metal, wood, machinery, appliances, etc., are carefully selected, inspected and tested, so as to detect and exclude defects and dangerous conditions, does not make the employer an insurer of the workman's safety or require that he shall furnish tools and appliances free from defects, but imposes merely the general duty of selection, inspection and testing, which is no more than his common-law duty.

*Benkowski v. Sanders & Egbert Co.*, 374, 379 (4), 380 (4).

42. *Specific Directions.—Presumptions as to Risks.—Instructions.*—An instruction that it is the servant's duty to obey the orders and directions of the master, and that in the absence of notice or knowledge to the contrary he has the right to presume and to act upon the presumption that the master will not order him into a place of danger, or to perform dangerous work, without notifying him of such danger, and if the master does order him to do specified work, he has the right to presume, in the absence of knowledge, or notice, to the contrary, that it is reasonably safe for him to obey such orders and perform such work and that he is encountering no unusual dangers by doing so, was a correct expression of the law and applicable to the issues in an action for injuries to a servant, who, without experience or warning, was temporarily directed to assist in handling glass under circumstances involving extraordinary and unusual risks. *Marietta Glass Mfg. Co. v. Bennett*, 435, 451 (13).

**MEASURE OF DAMAGES—**

In an action for damages for obstructing a natural watercourse, see RAILROADS 19.

**MECHANICS' LIENS—**

Waiver of, see CONTRACTS 2.

*Materialmen.—Submaterialmen.—Right to Lien.*—One who contracted with an owner to furnish complete two flights of stairs according to specifications for the particular house to be constructed but not to affix the stairs to the house, was not a contractor within the terms of the mechanic's lien statute, but a materialman only; hence a third person to whom he sublet the contract, and who talked with the owner about it, and was given specifications by him, and delivered the stairs on the owner's premises, stood in the position of a materialman furnishing material to a materialman and was not entitled to a lien.

*Rudolph Hegener Co. v. Frost*, 108.

**MEMORANDA—**

See FRAUDS, STATUTE OF 2-6; PLEADING 12.

**MINES AND MINERALS—**

1. *Leases.—Exploration.—Failure to Discover Mineral.—Liability of Lessee.*—As a general rule, where a lease is executed for the pur-

**MINES AND MINERALS—Continued.**

pose of exploring for, mining and taking out merchantable mineral and it thereafter appears that no mineral is to be found, the lessee is not charged with the consideration.

*Vandalia Coal Co. v. Underwood*, 675, 682 (3).

2. *Leases.—Construction.*—Where the provisions of a coal mine lease are so ambiguous as to make it impossible to determine therefrom when the payment of the stipulated royalty and rent was to commence, the interpretation placed thereon by the parties early in the life of the lease and prior to litigation, to the effect that the lease was to yield \$600 per annum from the date of execution, will be accepted as a practical construction by the parties.

*Vandalia Coal Co. v. Underwood*, 675, 681 (2).

3. *Leases.—Construction.*—Coal mining leases are in two general classes, those by which the lessee is required to pay the lessor a certain amount of money at stated intervals irrespective of the productiveness of the mine, and those providing for the payment of a royalty on the quantity of mineral mined with a requirement that a stipulated amount be mined within a stated period of time, and a lease providing for the payment of a stipulated sum on each ton of coal mined, and declaring that in case a certain amount of coal should not be mined the lessees should pay to lessor \$600 per annum, was within the latter class.

*Vandalia Coal Co. v. Underwood*, 675, 680 (1).

4. *Leases.—Construction.*—Where a mining lease provided that it should continue for fifteen years unless the minable coal in the land should be sooner exhausted, that the lessee should pay a fixed royalty, and, in case the royalty did not reach a minimum sum, should pay that sum per annum, and that the lessee should have the right to abandon the lease at any time on account of the thinness of coal, and authorized the lessee to remove through lessor's land coal found in the adjoining land, and the lessee thereafter opened a mine and exhausted all the coal in lessor's land, the lessee was not liable for the payment of the royalty or the stipulated annual sum after the exhausting of the coal, though there was no formal surrender of the lease prior to the cessation of operations for coal in the adjoining land.

*Vandalia Coal Co. v. Underwood*, 675, 682 (4).

5. *Oil and Gas Leases.—Enforcement.*—An oil and gas lease providing that lessors were to have one-eighth of all the oil produced, and \$100 a year for each gas well, that one well should be drilled every sixty days after completion of the first well until six wells were completed, and that if no well were completed within sixty days from date of the lease the grant should be null and void, unless the lessee paid at the rate of fifteen dollars per month for such delay, and that, if the lessee should fail to drill any location as per agreement, the rental clause should hold good as per first location, was, by reason of the rental clause, incapable of enforcement against the lessee in an action to recover for failure to drill wells subsequent to the fourth one drilled, since the only penalty provided for such a failure was a forfeiture of lessee's rights.

*Kansas City Oil, etc., Co. v. Irick*, 246.

**MODIFICATION—**

Of contract, see SALES 16.

Of decree, see DIVORCE 1-4.

**MORTALITY TABLES—**

See EVIDENCE 1.

**MORTGAGES—**

1. *Deed as Mortgage.*—A deed absolute on its face may always be shown to be a mortgage, if it appears by the contract of the parties that it was in fact a mortgage, and for this purpose it is not necessary to aver that any fraud or misrepresentation was used.  
*Donlon v. Maley*, 25, 30 (4).
2. *Foreclosure.—Equitable Right of Redemption.*—The general equitable right of redemption is barred by the decree of foreclosure.  
*Fort Wayne, etc., Supply Co. v. Pfeiffer*, 615, 618 (1).
3. *Foreclosure.—Redemption.—Affidavit.—Sufficiency.*—A redemption affidavit by junior judgment lienholders who were parties to the foreclosure proceeding, and who had the status of their lien established in the decree entered therein, was not insufficient, though it was irregular, in not specifically referring to and describing their judgment and in describing the foreclosure decree instead, since the affidavit could be aided by the contents of the instruments or public records mentioned or referred to therein.  
*Fort Wayne, etc., Supply Co. v. Pfeiffer*, 615, 622 (3), 624 (3).
4. *Foreclosure Sale.—Redemption.—Construction of Statute.*—Where the holder of a junior lien has tendered to the purchaser at foreclosure sale the full amount of his claim, the redemption will be sustained notwithstanding the affidavit was in some respects irregular and especially where neither the mortgagor nor other junior lienholders are interposing any objection, since under such circumstances the statute authorizing such redemption will be liberally construed. *Fort Wayne, etc., Supply Co. v. Pfeiffer*, 615, 625 (5).
5. *Foreclosure Sale.—Right of Redemption.—Junior Judgment Lien.*—Where plaintiff in a foreclosure suit, to which the holders of a junior judgment lien were made parties defendant, obtained a personal judgment against the mortgagor in addition to the other relief granted by the foreclosure decree, and in addition to the provision for sale the decree determined the status of the lien of such defendants, the sale thereunder, at which the plaintiff bid in the property for the amount of its judgment, interest and costs, was primarily to satisfy the judgment on plaintiff's mortgage, and was not a sale by the holders of the junior judgment lien so as to preclude them from the statutory right of redemption under §814 Burns 1914, §771 R. S. 1881.  
*Fort Wayne, etc., Supply Co. v. Pfeiffer*, 615, 618 (2).

**NATURAL LAWS—**

See APPEAL 67.

**“NATURAL WATERCOURSE”—**

See WORDS AND PHRASES.

See WATERS AND WATERCOURSES 1, 2.

**NAVIGABLE WATERS—**

*Riparian Rights.—Right of Owner of Easement.*—An easement in land bordering on navigable waters carries such riparian rights in the submerged lands between the shore and the navigable portion of such body of water as are appropriate and necessary to give effect to the easement.

*Shedd v. American Maize, etc., Co.* 146, 156 (6).

**NEGLIGENCE—**

See CARRIERS 9, 10, 12–14, 22; HIGHWAYS 5; MASTER AND SERVANT 40; RAILROADS 16.

A county is not liable for the, of its officers, see COUNTIES 1, 2.



**NEGLIGENCE—Continued.**

1. *Action.—Instructions.—“Non Sui Juris.”*—An instruction in an action for personal injuries to a child six years of age, giving the essential definition of “*non sui juris*” in which accountability and appreciation of danger were clearly defined, was not defective for failure to use the technical words “*non sui juris*.”  
*J. F. Darmody Co. v. Reed*, 662, 668 (7).
2. *Automobiles.—Duty of Driver.*—One driving a motor car from the street onto a private driveway across a sidewalk is charged with the duty to use the precautions which the circumstances require to inform persons on the sidewalk of his approach.  
*J. F. Darmody Co. v. Reed*, 662, 666 (4).
3. *Collision of Motor Vehicles.—Evidence.—Directing Verdict.*—In an action for injuries sustained by plaintiff in a collision with defendant’s motor truck, where the evidence conclusively showed that plaintiff was riding a motorcycle along the street in the same direction in which the motor truck was being driven, that on the approach of the truck to an intersecting street the plaintiff, without warning or signal to the driver of the truck, attempted to pass on the right side of the truck while riding at an excessive speed and contrary to a city ordinance requiring overtaking vehicles to pass to the left, and notwithstanding there was ample room for his passage to the left, and that while he was in the act of passing the motor truck was suddenly turned into the intersecting street, thereby striking plaintiff and causing his injuries, the court properly directed a verdict for defendant.  
*Borg v. Larson*, 514, 516 (1), 518 (1), 519 (1).
4. *Collision on Streets.—Action.—Complaint.—Last Clear Chance.*—A complaint alleging that defendant was driving an automobile west on the north side of a highway and plaintiff was riding a motorcycle going east on the south side thereof at a speed of about eight miles per hour; that defendant negligently, without giving any warning to plaintiff, turned at a speed of twenty miles per hour to go south on an intersecting highway running north and south, and negligently ran his automobile upon and over plaintiff and injured him; was sufficient to enable plaintiff to invoke the doctrine of last clear chance.  
*Goodman v. Bauer* 671, 673 (3).
5. *Collision on Streets.—Action.—Evidence.—Sufficiency.*—In an action for damages for injuries received by an infant six years old who was run down by defendant’s motor car while he was on that portion of the sidewalk composing a private driveway, evidence showing that the driver saw the child in company with its uncle approaching the driveway, and disclosing the method in which the motor car approached, and that neither the child nor its uncle saw the motor car until it struck them, was sufficient to warrant the submission of the question of negligence to the jury, and its verdict for plaintiff can not be disturbed on appeal.  
*J. F. Darmody Co. v. Reed*, 662, 665 (1), 666 (1).
6. *Collision on Street.—Injury to Infant.—Trial.—Argument.*—Where an infant *non sui juris*, when struck by a motor car, was proceeding over a private driveway across a sidewalk, accompanied by his uncle, and the court fully instructed the jury as to the degree of care required of defendant under such circumstances, the contention that since the child was so accompanied the same degree of care was not required of defendant as would have been required if he were not so accompanied was a matter for argument to the jury rather than for an instruction by the court.  
*J. F. Darmody Co. v. Reed*, 662, 669 (10).
7. *Essential Elements.*—To constitute actionable negligence, there must have been a duty owing from defendant to the plaintiff

**NEGLIGENCE—Continued.**

to protect him from the injury of which he complains, a failure by defendant to perform that duty, and an injury to plaintiff resulting from such failure.

*Marietta Glass Mfg. Co. v. Bennett*, 435, 442 (1).

8. *Imputed Negligence.—Contributory Negligence.*—Where an infant six years of age was walking on the sidewalk accompanied by his uncle, negligence of the latter could not be imputed to the infant so as to render him guilty of contributory negligence.

*J. F. Darmody Co. v. Reed*, 662, 669 (9).

9. *Infants.—Contributory Negligence.—Review.*—Where the injured person was an infant who had not reached the age of accountability, the court on appeal will not consider the question of whether the child was guilty of contributory negligence, since such a child is *non sui juris*.

*J. F. Darmody Co. v. Reed*, 662, 666 (3).

10. *Last Clear Chance.—Contributory Negligence.*—Where the doctrine of last clear chance is applicable, the existence of negligence on the part of the injured person, or his failure to use due care, will not in all cases defeat a recovery.

*Pennsylvania Co. v. Reesor*, 636, 651 (13).

11. *Ordinary Care.*—Ordinary care is the care of an ordinarily prudent person and not that of a prudent person.

*Deer v. Suckow Co.*, 277, 283 (4).

12. *Railroads.—Injury to Animals.—Last Clear Chance.*—The doctrine of last clear chance may be applied in cases involving negligent injury to or the killing of animals, and also in cases involving inanimate property.

*Vandalia R. Co. v. Duling*, 332, 348 (5).

13. *Repairing Occupied Rooms.*—Where defendant was employed to repair rooms which it knew to be occupied, its knowledge imposed upon it a duty to use ordinary care with reference to the occupants, regardless of whether the occupancy was lawful or otherwise.

*P. B. Arnold Co. v. Buchanan*, 626, 635 (9).

14. *Trial.—Verdict.—Answers to Interrogatories.—Wilful Injury.*—A verdict on a paragraph of complaint charging negligence can not stand as against the jury's special finding that the injury was wilfully inflicted.

*Pennsylvania Co. v. Reesor*, 636, 642 (2).

15. *Wilful Injury.*—Acts or omissions complained of can not be both negligent and wilful, since to constitute a wilful injury the act or omission which produced it must have been intentionally committed or omitted under such circumstances as to evince a reckless disregard for the safety of others and a willingness to inflict the injury.

*McDermott v. Board, etc.*, 209, 215 (2).

**NEWLY DISCOVERED EVIDENCE—**

See NEW TRIAL 3.

**NEW TRIAL—**

Motion for, see APPEAL 18–22, 46.

Misconduct, surprise or variance on the question of a, see APPEAL 22.

1. *Independent Action.—Appeal.*—Where a new trial on the ground of newly discovered evidence is refused in an independent action brought under §589 Burns 1914, §572 R. S. 1881, the applicant, if relying on the evidence in an appeal, should make the evidence a part of the record by a proper bill of exceptions.

*Meldon v. Cox*, 403, 406 (4).

2. *Independent Action.—Complaint.*—A complaint for a new trial under §589 Burns 1914, §572 R. S. 1881, is an action independent



**NEW TRIAL—Continued.**

of the original action in which the judgment was rendered, and must stand or fall on its own merits, as a cause of action.

*Meldon v. Cox*, 403, 405 (1).

3. *Independent Action.—Newly Discovered Evidence.*—To sustain an independent action for a new trial under §589 Burns 1914, §572 R. S. 1881, on the ground of newly discovered evidence, it must appear that such evidence is not merely cumulative and that it would probably change the result if a new trial were granted, and it must also be shown that it was discovered subsequent to the term at which the original trial was had and that it could not have been discovered before the trial by the exercise of due diligence.

*Meldon v. Cox*, 403, 405 (2), 406 (2).

4. *Independent Action.—Procedure.*—Upon the joinder of issues in an independent action for new trial under §589 Burns 1914, §572 R. S. 1881, on the ground of newly discovered evidence, plaintiff should introduce in evidence the record of the original trial, prove what the evidence was upon such trial, and make proof of the newly discovered evidence together with a showing that it was discovered since the term at which the cause was originally tried and that due diligence was used to discover the same before the original trial; and the defendant should in like manner introduce his evidence before the court.

*Meldon v. Cox*, 403, 405 (3).

5. *Independent Action.—Review.*—Where, in an independent action under §589 Burns 1914, §572 R. S. 1881, for a new trial on the ground of newly discovered evidence, the method adopted by the applicant for presenting the oral evidence heard at the original trial was by asking the official reporter only as to what was said concerning the salient fact upon which the action turned, and from his testimony and from the evidence generally it appeared that the issue was clouded with uncertainty, it was for the trial court to conclude whether the alleged newly discovered evidence was such as to warrant the granting of a new trial, and its judgment was conclusive.

*Meldon v. Cox*, 403, 407 (5).

6. *New Trial as of Right.*—In an action for possession and to quiet title, in which the occupants of the land also sought specific performance of a contract entered into between the parties, a new trial as of right was properly denied.

*Tuell v. Homann*, 285, 293 (6).

7. *New Trial as of Right.*—A new trial as of right could not be had where the action made out by the complaint was one to enforce a trust and obtain an accounting, and in which the title to land was but incidentally involved, notwithstanding a new trial as of right might have been had as to the cause stated in the first paragraph had it stood alone.

*Donlon v. Maley*, 25, 30 (5).

**“NON SUI JURIS”—**

See WORDS AND PHRASES.

**NOTICE—**

See VENDOR AND PURCHASER.

Effect of, to vacate, see LANDLORD AND TENANT 1.

Necessity for, or demand for abatement, see NUISANCE 1.

Of sickness, see INSURANCE 12-14.

To purchaser of the intention to resell, see SALES 4.

To retax costs with respect to docket fees, see APPEAL 27.

**NUISANCE—**

Creation of, see EASEMENTS 16.

1. *Action.—Necessity for Notice or Demand for Abatement.*—Where a nuisance was created by defendant in collecting oil and salt water from its wells and emptying same on plaintiff's land, no notice or demand on it for abatement of the nuisance was necessary as a condition precedent to an action for damages.

*King-Crowther Corp. v. Ashcraft*, 412, 414 (2).

2. *Complaint.—Notice.—Demand.*—A complaint which, when considered as a whole, clearly proceeded on the theory that defendant by the acts complained of knowingly created a nuisance on plaintiff's land to her damage, and contained all the averments necessary to make it sufficient on that theory, was not objectionable for failure to aver notice or demand for the abatement of the nuisance, or because some of the averments tended to obscure rather than elucidate its theory.

*King-Crowther Corp. v. Ashcraft*, 412, 413 (1).

**NUNC PRO TUNC—**

An entry, see APPEAL 15, 16.

**OBJECTIONS—**

To evidence, see APPEAL 60, 61, 63, 68, 69.

**OIL LEASES—**

See MINES AND MINERALS 5.

**OPINIONS—**

See EVIDENCE 2.

**“OR”—**

See WORDS AND PHRASES.

**ORDINARY CARE—**

See NEGLIGENCE 11.

**PAROL—**

Variation by, see EASEMENTS 4.

**PAROL EVIDENCE—**

See FRAUDS, STATUTE OF 3.

**PARTIES—**

See APPEAL 9, 13, 23, 24; EASEMENTS 2, 8; MALICIOUS PROSECUTION 4; TAXATION 7.

Construction by, see CONTRACTS 1, 1a.

Knowledge of, see DIVORCE 3.

**“PARTY TO BE CHARGED”—**

See WORDS AND PHRASES.

**PASSENGERS—**

Alighting from street car, see CARRIERS 25, 26.

Carriage of, see CARRIERS 15-20.

Injuries to, see CARRIERS 21-24.

**PAYMENT—**

1. *What Constitutes.*—The delivery of a township warrant and its acceptance by plaintiffs in ignorance of the fact that it was invalid and created no liability against the township, was not a payment by defendants for materials furnished under an agreement that they were to pay for same by the delivery of a valid and merchantable warrant on the township. *Everly v. Ball*, 7, 13 (2).

**“PENDING LITIGATION”—**

See WORDS AND PHRASES.

**PERSONAL INJURIES—**

See DAMAGES 2.

**PERSONS—**

Injuries to, on streets, see STREET RAILROADS.

Injuries to, on tracks, see RAILROADS 12-17.

Liable for services, see PHYSICIANS AND SURGEONS 4, 5.

**PHYSICIANS AND SURGEONS—**

1. *Care and Skill Required.*—In determining whether a physician or surgeon has exercised the degree of care and skill which the law requires, regard must be had to the advanced state of the profession at the time and in the locality in which he practices.  
*Adolay v. Miller*, 656, 660 (2).
2. *Care and Skill Required.—General Rule.*—In the absence of a special agreement a physician or surgeon is deemed to impliedly contract that he possesses the reasonable and ordinary qualifications of his profession and that he will at least exercise reasonable skill, diligence and care, but a promise to effect a cure will not be implied.  
*Adolay v. Miller*, 656, 659 (1).
3. *Care and Skill Required.—Specialists.*—A physician or surgeon employed as a specialist is bound to use the degree of skill and knowledge which is ordinarily possessed by physicians who devote special attention and study to the disease, its diagnosis and treatment, having regard to the present state of scientific knowledge.  
*Adolay v. Miller*, 656, 660 (3).
4. *Liability for Services.—Persons Liable.*—Ordinarily a person who summons medical aid for another is not liable for the value of such services unless he stands in some relationship creating an obligation to furnish such aid, nor is a corporation generally liable for the employment, by one of its officers, of physicians and surgeons to attend upon sick and injured employees, unless it gave special authority for such employment.  
*Vandalia R. Co. v. Bryan*, 223, 227 (1).
5. *Liability for Services.—Persons Liable.*—Where, pursuant to authority arising from the emergency, a railroad station master employed a surgeon to attend a person struck by a train, and afterwards notified him that the company would not be liable for any further services or attention rendered the injured person, the surgeon could not recover from the company for any services rendered after such notice beyond what was absolutely demanded by the emergency.  
*Vandalia R. Co. v. Bryan*, 223, 229 (4).
6. *Malpractice.—Evidence.*—In an action for malpractice in the treatment of a fractured arm, evidence merely showing the acts of defendants as the same were observed by plaintiff and his wife, and that defendants stated that in their belief the arm would be

**PHYSICIANS AND SURGEONS—Continued.**

restored to its usefulness, while in fact it was not thus restored, was not sufficient to make a case for plaintiff, since there was no evidence to give the jury a standard by which to determine whether there was a neglect of duty on the part of defendants.

*Adolay v. Miller*, 656, 661 (4).

**PLEADING.**

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|-------------------------------|-----------------------|
| I. FORM AND ALLEGATIONS, 1-3. | III. ANSWER.          |
| II. COMPLAINT, 4-10.          | IV. DEMURRER, 11, 12. |

See ACTION 2; FRAUDS, STATUTE OF 1; SALES 8.

Where a party relies upon estoppel *in pais* to avoid a defense set up in the special answer, he must plead it, see ESTOPPEL 1.

**I. FORM AND ALLEGATIONS.**

1. *Sufficiency.—Aider by Evidence.*—The sufficiency of a pleading, either on demurrer or on a motion in arrest of judgment, must be determined from its own averments without reference to the evidence.  
*Pillsbury, etc., Co. v. Walsh*, 76, 88 (7).
2. *General and Special Averments.—Inconsistency.*—Specific averments, when inconsistent with a general averment, will control, and in such case the sufficiency of the pleading will be determined from the specific averments.  
*Pillsbury, etc., Co. v. Walsh*, 76, 91 (11).
3. *Judgment on Pleadings.—Statutes.*—Under §592 Burns 1914, §566 R. S. 1881, providing for judgment on the pleadings though a verdict has been returned against the party entitled thereto, a defendant is not entitled to a judgment on the pleadings where the verdict is based on a paragraph of complaint which was good against demurrer.  
*Pennsylvania Co. v. Reesor*, 636, 646 (5).

**II. COMPLAINT.**

See CANCELLATION OF INSTRUMENTS 2; CARRIERS 23; CONTRACTS 6; EASEMENTS 6, 7; MASTER AND SERVANT 20, 21, 31, 32; NEGLIGENCE 4; NEW TRIAL 2; NUISANCE 2; RAILROADS 13, 18; SALES 1, 5, 9, 16; TRESPASS.

Sufficiency of, see APPEAL 35; SALES 15.

4. *Amendment.*—The filing of an amended complaint takes the original from the record.  
*Jones v. Chatfield & Woods Co.*, 265, 268 (1).
5. *Initial Attack on Appeal.*—The sufficiency of a complaint can not be questioned for the first time on appeal under §348 Burns 1914, Acts 1911 p. 415.  
*Graham v. Henderson Elevator Co.*, 697, 699 (1).
6. *Sufficiency.—Initial Attack on Appeal.*—An original attack on appeal made against a complaint consisting of more than one paragraph could not prevail if either paragraph was good.  
*Ward v. Perry*, 1, 6 (4).
7. *Attack by Motion in Arrest of Judgment.*—A complaint is subject to attack by a motion in arrest of judgment only where its defects are not cured by the verdict, or the statute of amendments, or are not waived by a failure to demur.  
*Pillsbury, etc., Co. v. Walsh*, 76, 92 (13).
8. *Theory.*—The theory of a complaint is to be determined from its general scope and tenor and not from fragmentary statements, de-

**PLEADING—Continued.**

tached parts or conclusions of the pleader, and that theory will be adopted which is most apparent and clearly outlined by the leading averments. *Graham v. Henderson Elevator Co.*, 697, 701 (5).

9. *Failure to Demur.—Motion in Arrest of Judgment.—Review.*—Where the defect in a complaint consists merely in the omission of some averment which, if present in the complaint, would make a good cause of action, a failure to demur under §§344, 348 Burns 1914, Acts 1911 p. 415, waives such defect or omission, and, in determining whether a motion in arrest of judgment was properly sustained, the court on appeal must treat the complaint as sufficient to meet the proper proof and will not look to the evidence to see whether such proof was in fact made.

*Pillsbury, etc., Co. v. Walsh*, 76, 93 (14).

10. *Cross-Complaint.—Sufficiency on Motion in Arrest of Judgment.*—A complaint or cross-complaint challenged for the first time by a motion in arrest of judgment, will be treated as sufficient unless some material averment essential to the cause of action has been entirely omitted therefrom. *Tuell v. Homann*, 285, 288 (1).

**III. ANSWER.**

See INSURANCE 3.

An answer alleging the violation by insured of a warranty as to an existing fact, must allege an offer to return the premiums paid, see INSURANCE 2.

**IV. DEMURRER.**

Ruling on, see APPEAL 45, 103–105, 125, 126.

To reply must contain memorandum of defects, see APPEAL 100.

No question is presented on appeal with reference to the sufficiency of complaint where the demurrer thereto is not accompanied by a memorandum of defects, see APPEAL 101.

11. *Scope of Inquiry.*—A pleading tested by a demurrer must stand or fall by its own averments alone, though the omission from a complaint may be cured or rendered harmless by an admission of the adverse party in his answer.

*Shedd v. American Maize, etc., Co.*, 146, 158 (9).

12. *Demurrer to Answer.—Memorandum.*—Under §344 Burns 1914, Acts 1911 p. 415, relating to procedure in civil cases, a demurrer to an answer, in order to present any question on appeal, must be accompanied by a memorandum pointing out the specific objections to such answer. *Harrold v. Whistler*, 504, 505 (1).

**POSSESSION—**

Right to, see EJECTMENT 4.

Tenant's right to, see LANDLORD AND TENANT 2.

**PRESCRIPTION—**

Easment by, see RAILROADS 18.

**PRESUMPTIONS—**

See APPEAL 70, 83, 106–108; CARRIERS 9, 19; EVIDENCE 3; HUSBAND AND WIFE 6.

As to risks, see MASTER AND SERVANT 42.

**PROOF—**

See SALES 8.

**PROPERTY—**

Assessment of, see **TAXATION** 1-3.

**“PROXIMATELY”—**

See **WORDS AND PHRASES**.

**PURCHASER—**

Action against, see **SALES** 10, 11.

**QUESTIONS FOR JURY—**

See **MASTER AND SERVANT** 17; **RAILROADS** 4, 6, 8.

**QUIETING TITLE—**

1. *Action Against Occupant.—Defenses.—Right to Dispute Plaintiff's Title.*—Where defendants in a suit for possession and to quiet title entered on the land in dispute under claim of ownership and under the belief that the title was in themselves, the general rule, that a tenant is estopped while in possession to deny the landlord's title, could not be invoked against them.

*Tuell v. Homann*, 285, 292 (5).

**RAILROADS—**

1. *Animals on Tracks.—Statutory Liability.—Fences.—Burden of Proof.*—To escape liability for animals killed or injured upon its tracks imposed by §§5436-5442 Burns 1914, §§4025-4031 R. S. 1881, a railroad company has the duty to show affirmatively that the place where the animals entered upon its tracks was one which it was not bound to fence.  
*Cleveland, etc., R. Co. v. Vincent*, 476, 478 (2).
2. *Animals on Tracks.—Liability for Injuries.—Statutes.*—Section 5436 Burns 1914, §4025 R. S. 1881, imposing liability on railroad companies for stock killed upon their tracks by “locomotives, cars or other carriages,” etc., is not to be interpreted as meaning that in every case there must have been an actual contact or touching of the injured animal by the company's locomotive, car or other carriage in order to create liability.  
*Cleveland, etc., R. Co. v. Vincent*, 476, 482 (6).
3. *Animals on Tracks.—Liability for Injuries.—Statutes.*—In order to render a railroad company liable under §§5436-5442 Burns 1914, §§4025-4031 R. S. 1881, authorizing recovery for stock killed or injured on any railroad at any place where the same is not securely fenced, it must appear that the railroad was not securely fenced at the place where the stock entered thereon, and that such stock was injured or killed by some locomotive, car or other carriage operated on such railroad.  
*Cleveland, etc., R. Co. v. Vincent*, 476, 477 (1).
4. *Animals on Tracks.—Injury.—Duty to Fence.—Question for Court or Jury.*—In an action under the statute against a railroad company to recover for stock injured or killed upon its tracks, where the facts as to the place where the stock entered, and the character of the place, are undisputed, the question of whether the place was one which the statute requires the company to fence is a question of law for the court; but where the evidence is conflicting as to the character of the place, the question is for the jury.  
*Cleveland, etc., R. Co. v. Vincent*, 476, 479 (3), 480 (3).
5. *Animals on Tracks.—Action for Injuries.—Evidence.*—In an action against a railroad company under §§5436-5442 Burns 1914, §§4025-4031 R. S. 1881, to recover for the death of a horse, evidence showing that the horse while hitched to a buggy strayed from

**RAILROADS—Continued.**

the place where left by plaintiff, that at a point where the tracks crossed a highway it turned east along the tracks leaving tracks of the buggy wheels between the rails, that the buggy was completely demolished, and that the horse was standing near the place of collision and was so injured that it died within ten minutes after the collision, warranted an inference that the horse was either on the track or so close thereto as to have been struck by the train, and was sufficient to sustain the verdict for plaintiff on that issue.

*Cleveland, etc., R. Co. v. Vincent*, 476, 480 (5), 483 (5).

6. *Injury to Trespassing Animals.—Reasonable Care.—Jury Questions.*—Where defendant's engineer had information that animals had escaped upon defendant's tracks and that he would probably encounter them, a duty arose to use reasonable care to discover them, and, after their discovery, to avoid injuring them; and the question of whether such care was exercised was one of fact for the jury, in view of the fact that defendant also owed a duty to carry and deliver safely its passengers, and to the public and itself in the preservation of property. *Vandalia R. Co. v. Duling*, 332, 346 (2).

7. *Injury to Trespassing Animals.—Liability.*—At common law it is the owner's duty to keep his animals confined to his own premises, and if, notwithstanding his exercise of reasonable care to prevent it they escape to the right of way of a railroad company they are trespassers thereon, and the railroad company, being without fault respecting their escape, owes the owner no duty of seeing them, and, having no knowledge of their presence, would not be liable for injury or death caused by its train striking them; but where a company has knowledge of the presence on its tracks of animals that have escaped thereon without contributory negligence of their owner, a liability predicated on negligence may arise, dependent on the facts in each case, because of injury or death resulting from the operation of its train, regardless of whether the company had properly guarded and fenced its tracks; liability in such case being on the principle that a duty may arise from the knowledge of a situation, the violation of which constitutes negligence. *Vandalia R. Co. v. Duling*, 332, 339 (1).

8. *Employment of Surgeon.—Action for Services.—Jury Question.*—The question of what constituted first aid emergency services to a person struck by a train, in an action against the railroad company to recover therefor, was a question of fact for the jury.

*Vandalia R. Co. v. Bryan*, 223, 232 (6).

9. *Employment of Surgeon.—Liability for Services.—Calling in Other Surgeons.*—Where there was authority for the employment of a surgeon by a railroad station master so as to bind the company, and the emergency of the case made additional surgical and medical aid absolutely necessary, the surgeon thus employed was justified in calling the necessary additional aid and could recover for their services as well as for his own.

*Vandalia R. Co. v. Bryan*, 223, 228 (3).

10. *Employment of Surgeon.—Liability for Services.*—Where a surgeon was employed by a railroad station master, pursuant to authority arising from the emergency, to attend a man who had been injured by a train, the right of recovery for the services of such surgeon and of assistants called in by him was limited to emergency or first aid services, and when such services as were necessary to relieve the suffering of the injured party or preserve his life had been rendered, the emergency ceased to exist, and the company was not liable for subsequent medical services, unless by reason of some additional contractual relation.

*Vandalia R. Co. v. Bryan*, 223, 231 (5).



**RAILROADS—Continued.**

11. *Employment of Surgeon.—Liability for Services.*—Although on ordinary occasions a station master may not bind the railroad company for medical services, where an employe is injured so that immediate attention is demanded in order to save life, or prevent great injury, authority arises in the highest officer of the company present by reason of the emergency, to bind the company for such medical or surgical aid as the emergency demands; hence, where a trespasser was struck by a train, and by order of the company's superintendent was sent to a station where a surgeon rendered what assistance was possible, and, in the absence of hospital facilities, the man was then removed to another station where the necessary aid could be procured, the station master at the latter place had authority, in the absence of a higher official, to bind the company for such medical aid as the emergency demanded.

*Vandalia R. Co. v. Bryan*, 223, 227 (2).

12. *Injuries to Persons on Tracks.—Evidence.—Sufficiency.*—Evidence showing that decedent entered upon defendant's track at a public street crossing, and while walking east on the track a train approached from the east on the adjoining track which prevented decedent from hearing the approach of a train from the west on the track on which he was walking, that proper signals were not given, and that the engineer knew that decedent was unconscious of his peril, etc., was sufficient to sustain a verdict for plaintiff.

*Pennsylvania Co. v. Reesor*, 636, 655 (18).

13. *Injuries to Persons on Tracks.—Complaint.*—A paragraph of complaint alleging that decedent was walking east on defendant's south track when defendant's east bound train was approaching, and that its west bound train was approaching and passing on the other track, that the noise of the west bound train prevented him from hearing the approach of the train running east, and that the engineer of the latter train, when more than 800 feet away from decedent, saw him and discovered that he was in peril and unaware thereof, and discovered his peril in time, by the exercise of ordinary care, to have avoided the injury, but negligently failed to do so, and negligently ran into and killed decedent, was sufficient on demurrer.

*Pennsylvania Co. v. Reesor*, 636, 646 (6).

14. *Injuries to Persons on Tracks.—Evidence.—Contributory Negligence.*—In an action for the death of one who was run down by a train while walking on defendant's tracks, predicated on the theory of last clear chance, the admission of evidence to show that at the time of entering upon the tracks at a public street crossing decedent received no warning was proper, since under the issues the question of decedent's knowledge of the danger was important, in view of the fact that if decedent had actual knowledge of immediate danger and voluntarily encountered it he would have been guilty of such contributory negligence as to preclude recovery. while, if unconscious of the danger, the doctrine of last clear chance would apply.

*Pennsylvania Co. v. Reesor*, 636, 647 (8).

15. *Injuries to Person on Tracks.—Last Clear Chance.—Instructions.*—In an action, predicated on the doctrine of last clear chance, to recover for the death of one killed while walking on defendant's railroad tracks, an instruction stating the law upon the theory that, although decedent failed to exercise due care up to the moment of his injury, there could be a recovery if the engineer realized the danger of decedent, and knew that decedent was unconscious of his danger, and failed to use ordinary care to avoid injuring him, was not objectionable as failing to advise the jury that decedent was obliged to use ordinary care; nor was it erroneous as omitting the question of negligence and a definition of ordinary care, in view of

**RAILROADS—Continued.**

another instruction fully explaining the care required of the engineer.  
*Pennsylvania Co. v. Reesor*, 636, 650 (12), 651 (12).

16. *Injuries to Persons on Tracks.—Negligence.—Last Clear Chance.*  
 —Under the rule of last clear chance, as applied in an action for the death of a person killed while walking on defendant's tracks, if defendant's engineman actually saw decedent on the track, and realized or should have realized his peril by the exercise of ordinary care, then such engineman was charged with ordinary care to discover whether decedent was conscious of his danger, and to use all the means at hand and under his control to avoid the injury, and his failure to exercise ordinary care under such circumstances, and in such particulars, was negligence constituting the proximate cause of the injury, and the want of due care by decedent was the remote cause.  
*Pennsylvania Co. v. Reesor*, 636, 653 (15).
17. *Injuries to Persons on Track.—Instructions.—Last Clear Chance.*  
 —In an action for the death of a person who was run down by one of defendant's trains, an instruction advising the jury that if the engineer actually saw decedent upon the track and thereafter realized decedent's perilous situation and that he was unconscious of his danger, or if by the exercise of due care the engineer could have known of decedent's peril and his unconsciousness thereof, such engineer could not indulge the presumption that decedent would leave the track in time to avoid injury, and was required to use all the means at hand and under his control to avoid the injury, did not charge defendant with the duty of using ordinary care to discover decedent on the track in the first instance, and was not misleading to the jury.  
*Pennsylvania Co. v. Reesor*, 636, 652 (14).
18. *Obstruction of Watercourse.—Complaint.—Sufficiency.—Easement by Prescription.*—A complaint against a railroad company for damages for the obstruction of water flowing across defendant's right of way through plaintiffs' land, which did not disclose that plaintiffs or their predecessors caused the water to flow across the right of way under a claim of right to do so, necessarily failed to show the adverse exercise of such a right, and was therefore insufficient on the theory of an obstruction of a prescriptive watercourse.  
*Vandalia R. Co. v. Yeager*, 118, 123 (3).
19. *Obstructing Watercourses.—Measure of Damages.—Successive Actions.*—In an action against a railroad company for damages for obstructing a natural watercourse, on the theory of a continuing but temporary injury to plaintiff's land, the measure of damages, in the absence of allegations showing some special damages or a permanent injury, is the depreciation in the value of the use or the rental value of the land, and is limited to the period marked by the commencement of the action; but successive actions may be maintained for subsequent periods if the wrong and the injury continue, and where a supplemental complaint is filed recovery may be had to the time of its filing. *Vandalia R. Co. v. Yeager*, 118, 130 (8).
20. *Obstruction of Natural Watercourse.—"Stream of Water."—"Watercourses."—Pleading.*—A complaint against a railroad company for damages charging the obstruction of water flowing across defendant's right of way through the land of plaintiffs, which alleged in effect the existence of a course through which water had flowed without interruption for a number of years prior to the injuries complained of, and characterized the same as a "running stream of water" and also as a "natural watercourse," by means of which the land of plaintiffs was drained, showed the obstruction of a natural watercourse; the distinction between a "stream of water" and a "watercourse" being shadowy and unsubstantial,

**RAILROADS—Continued.**

while a "natural watercourse" is a channel cut by the force of its own running waters. *Vandalia R. Co. v. Yeager*, 118, 123 (4).

21. *Obstruction of Natural Watercourse.—Evidence.—Liability.—*

Where a railroad company constructed its track over the land of plaintiffs and across a natural watercourse running through such land, placing a culvert under the track sufficient to take care of the water without serious damage to the farm, which culvert was subsequently replaced by sewer pipe of capacity to carry the water except after heavy rains, and plaintiffs constructed underground tile drains under the track which alone carried the water of the stream except after heavy rains, when the water flowed down the line of the ancient channel to the sewer pipe, and, in so doing, recut the channel which plaintiffs had from time to time effaced by plowing and cultivating the land, and it was shown that eventually the railroad company constructed a side track so as to obstruct the mouth of the sewer pipe and cause the land to be flooded, a finding that the company had obstructed a natural watercourse was warranted, since the construction of the tile drains did not change the character of the watercourse, though the only waters thereafter flowing therein were surface waters from rains, in view of the fact that all waters flowing within the limits of the channel, though in part flood waters, were a part of the waters of the watercourse. *Vandalia R. Co. v. Yeager*, 118, 125 (5), 128 (5).

22. *Construction.—Watercourses.—*The rules defining the liability of landowners with reference to obstructing the flow of water apply also to a railroad company in improving, using or protecting its right of way, and though a railroad is by statute authorized to construct its road across any stream of water or watercourse, its interference with the free use of the stream, or failure to restore it to substantially its former state, renders the company liable to respond in damages to any one injured thereby.

*Vandalia R. Co. v. Yeager*, 118, 122 (2).

23. *Statutory Provisions.—Duty to Fence.—*Under §§5436–5442 Burns 1914, §§4025–4031 R. S. 1881, a railroad company is not required to fence its road at stations, though the same are not frequently used, nor at places where fencing would interfere with the business and operations of the company and the safety of its employes, or where it would interfere with the public convenience.

*Cleveland, etc., R. Co. v. Vincent*, 476, 480 (4).

**REASONABLE CARE—**

See RAILROADS 6.

**RECEIVERS—**

1. *Dividends.—Duty of Creditors.—*To entitle a creditor to a dividend in a receivership proceeding, it is not enough that the receiver be put upon inquiry as to the claim, but such creditor must file proof in itself satisfactory.

*Pottlitzer v. Citizens Trust Co.*, 45, 66 (11).

2. *Intervention by Creditors.—Discretion of Court.—*Creditors desiring to intervene in receivership proceedings must do so under §273 Burns 1914, §272 R. S. 1881, by first procuring leave of court, and the application or motion for such leave calls for the exercise of judicial discretion and must be presented to the judge lawfully presiding in the receivership proceeding.

*Pottlitzer v. Citizens Trust Co.*, 45, 65 (10), 66 (10).

3. *Nature and Effect of Proceedings.—*A receivership proceeding is not purely *in rem*, and neither the acts of the receiver nor the or-

**RECEIVERS—Continued.**

ders of the court are binding on persons not parties to the proceeding, nor will the appointment of a receiver generally affect or divest an existing lien.

*Pottlitzer v. Citizens Trust Co.*, 45, 66 (12).

4. *Objections to Order for Distribution.—Review.*—Alleged error directed to the action of the court in sustaining a receiver's petition for distribution is not presented by the overruling of a petition to set aside the order of distribution filed long after the distribution had been made and approved, there having been no objection and exception to the ruling on the receiver's petition.

*Pottlitzer v. Citizens Trust Co.*, 45, 60 (4), 62 (4).

5. *Report.—Order for Distribution.*—Where a receiver reported on every claim filed and showed that he had a balance of cash on hand, and that in his opinion a dividend of sixty-five per cent could be properly declared, such report, in the absence of any exceptions filed thereto, warranted the court in granting an order of distribution thereon.

*Pottlitzer v. Citizens Trust Co.*, 45, 61 (5).

6. *Rights of Creditors.—Intervention.—Laches.*—Where it appeared that a creditor had notice of the time fixed by the court for the filing of claims in a receivership proceeding, and through her attorney informed the receiver that her claim would not be filed, the action of the court in disallowing her petition to intervene and have her claim allowed, presented more than two years after the receiver was appointed and more than a year after the time fixed for filing claims and after distribution was made, was not an abuse of the discretion vested in the court in such matters.

*Pottlitzer v. Citizens Trust Co.*, 45, 67 (13).

**REDEMPTION—**

Statutes authorizing, of real estate from judicial sales are remedial in character, see **STATUTES 2**.

**RESCISSION—**

See **DEEDS 5**.

**RES IPSA LOQUITUR—**

See **CARRIERS 27**.

**REVIEW—**

As to evidence, see **APPEAL 54–75**.

As to instructions, see **APPEAL 76–96**.

As to pleadings, see **APPEAL 97–105**.

**RIPARIAN RIGHTS—**

See **EASEMENTS 14**.

**SALES—**

Judicial, see **STATUTES 2**.

Of goods, see **FRAUDS, STATUTES OF 4–6**.

Tax, see **TAXATION 4–8**.

1. *Action for Breach of Contract.—Complaint.*—A complaint alleging that certain letters therein set out relative to a sale of corn had passed between plaintiff and defendant, that thereafter plaintiff's representative examined the corn, and that plaintiff and defendant "entered into the agreement as aforesaid" whereby defendant agreed to deliver to plaintiff a specified quantity of corn on terms

**SALES—Continued.**

therein specified, was on the theory of an action for the breach of a written contract evidenced by such letters, there being no other "agreement" alleged.

*Graham v. Henderson Elevator Co.*, 697, 701 (6).

2. *Action for Price.—Evidence.*—In an action for the price of a car-load of window glass sold to defendant through plaintiff's selling agent, a letter written by such agent to defendant acknowledging receipt of a copy of specifications forwarded by defendant the day before, together with a prior telegram from the selling agent's representative to defendant, to the effect that the selling agent accepted defendant's order for two cars of window glass, and that plaintiff's president would call, were properly admitted in evidence, since the telegram was an essential part of the contract, and the letter was a step in the consummation of the arrangements made.  
*Buckeye, etc., Co. v. Stewart-Carey, etc., Co.*, 302, 311 (6).
3. *Anticipatory Breach of Contract.—Remedy of Seller.*—In cases where the doctrine of anticipatory breach of contract is applicable, the seller of goods, on the repudiation of the contract by the purchaser, may accept the repudiation and treat the contract as rescinded for all purposes except that of predicated damages thereon for its breach, and may then, before the time of performance, sue for damages for an anticipatory breach, in which event the measure of damages is ordinarily the difference between the contract price and the price at the place of delivery at the time of the repudiation.  
*Pillsbury, etc., Co. v. Walsh*, 76, 84 (4).
4. *Breach of Contract.—Resale.—Notice.*—A complaint for damages for the purchaser's breach of a contract of sale, grounded upon the theory of resale after the purchaser's refusal to accept, must aver notice to the purchaser of the intention to resell.  
*Napier Iron Works v. Caldwell, etc., Iron Works*, 317, 322 (6).
5. *Breach of Contract.—Action by Seller.—Complaint.*—Where, on the purchaser's breach of a contract for the sale of goods, the seller has chosen either to retain or store the property as and for the purchaser, or to sell the same for and as the agent of the purchaser, the complaint in an action for damages against the purchaser must allege facts showing the seller's right to the remedy chosen, and in either case that possession of the property was retained for the purchaser, and, if sale of the property has been made, that such sale was made by the seller for and as the agent of the purchaser after proper notice of intention to sell; but an exception as to notice exists in cases where the property is of a perishable nature.  
*Pillsbury, etc., Co. v. Walsh*, 76, 84 (5).
6. *Breach of Contract.—Remedy of Seller.*—Where, on the purchaser's breach of a contract for the sale of goods, the seller elects to keep the property as his own and recover the difference between the contract price and the market price at the time and place of delivery, it is immaterial whether the seller keeps or sells the property so retained, or at what price it is sold, if he sells same.  
*Pillsbury, etc., Co. v. Walsh*, 76, 86 (6).
7. *Breach of Contract.—Remedy of Seller.*—On the purchaser's breach of a contract of sale of goods the seller may retain or store the property as and for the purchaser and sue him on the contract for the entire purchase price, or he may sell the goods for and as the agent of the purchaser and recover from him the difference between the amount obtained and the contract price, or he may keep the property as his own and recover the difference between the contract price and market price at the time and place of delivery.  
*Pillsbury, etc., Co. v. Walsh*, 76, 83 (3).



**SALES—Continued.**

8. *Breach of Contract.—Special Damages.—Pleading.—Proof.*—If special damages are relied on by the seller of goods in an action against the purchaser for breach of the contract, the facts on which they are based must be specially pleaded, but those damages ordinarily flowing from the breach of the contract complained of are provable under a general averment that the plaintiff was damaged by a specified sum by the breach of the contract sued on.

*Pillsbury, etc., Co. v. Walsh*, 76, 90 (10).

9. *Breach of Contract.—Complaint.—Sufficiency on Motion in Arrest of Judgment.*—A paragraph of complaint against a purchaser for his breach of a contract for 500 barrels of flour, alleging that 275 barrels were received and paid for by the purchaser, that the remaining 225 barrels were shipped to purchaser, who refused without cause, to accept same and that on account of such refusal plaintiff was "compelled to and did sell the flour for the best price obtainable at that time," and that the flour was sold at a certain price, though not directly averring that the flour was sold at the market price at the time and place of delivery, warranted the inference that such was the case, and was sufficient as against a motion in arrest of the judgment.

*Pillsbury, etc., Co. v. Walsh*, 76, 91 (12).

10. *Breach of Contract.—Action Against Purchaser.—Evidence.*—A verdict for plaintiff based on paragraphs of complaint charging that plaintiff shipped flour to a purchaser in pursuance to the contract, which the latter refused to accept, and that plaintiff was compelled to and did sell the flour at the best price obtainable for a stated sum, was sustained by sufficient evidence, where the shipment of the flour to the place designated, and its refusal, were shown, and the evidence as to the subsequent sale of the flour by plaintiff was of such character as to justify the jury in inferring the market price of the flour in question at the time and place of its delivery under the contract.

*Pillsbury, etc., Co. v. Walsh*, 76, 96 (17).

11. *Breach of Contract.—Action Against Purchaser.—Evidence.*—Paragraphs of complaint against the purchaser of flour proceeding on the theory that plaintiff manufactured the flour according to the terms of the contract of sale, that plaintiff was at all times ready and willing to perform all the conditions of the contract on its part to be performed, and that at the time fixed for delivery plaintiff had the flour on hand and was ready and willing to deliver in compliance with the contract, were not established by evidence showing that no flour was manufactured for delivery under such contract, but that when the order was received plaintiff bought the wheat necessary to make the flour, and that on being notified that purchaser would not take the flour plaintiff cancelled the order and charged purchaser with the difference between what had been paid for the wheat and what could be realized for the flour.

*Pillsbury, etc., Co. v. Walsh*, 76, 95 (16).

12. *Contracts.—Customs and Usages.*—Where a contract of sale is neither ambiguous nor uncertain, and clearly shows the time and manner of shipment, trade usages and customs are not to be considered in its construction.

*Napier Iron Works v. Caldwell, etc., Iron Works*, 317, 322 (4).

13. *Contracts.—Agreement for Extension.—Consideration.*—Where a quantity of iron sold under a written contract to be delivered within a specified period, was not delivered and the title and possession thereof remained in the seller relieved from any of the agree-

**SALES—Continued.**

ments contained in the contract, an agreement for extension of time of delivery, to be valid and bring the sale within the provisions of the original contract, required a new consideration.

*Napier Iron Works v. Caldwell, etc., Iron Works, 317, 322 (3).*

14. *Contracts.—Stipulations as to Time.—Waiver.—Estoppel.*—Where plaintiff accepted defendant's order for two cars of window glass on the stipulation that shipments should be made in October, and shipped one car on October 29, which defendant accepted and paid for on November 10, and defendant, on October 31, notified plaintiff that it would not accept shipments, made after that date, defendant's acceptance of the first shipment, though subsequent to the time when second shipment was sent forward, was not a waiver of any of defendant's rights and did not estop it from insisting that time was of the essence of the contract.

*Buckeye, etc., Co. v. Stewart-Carey, etc., Co., 302, 313 (7).*

15. *Failure to Deliver.—Action.—Sufficiency of Complaint.*—Paragraphs of complaint in a seller's action to recover on a contract of sale, from which it affirmatively appeared that no shipments were made by plaintiff during the period of time specified in the contract, and in which no legal excuse for such failure was shown, were insufficient.

*Napier Iron Works v. Caldwell, etc., Iron Works, 317, 320 (1).*

16. *Failure to Deliver.—Modification of Contract.—Complaint.*—Where the contract for the sale of a large quantity of iron was in writing, and was within the class of contracts which are required to be in writing by §7469 Burns 1914, §4910 R. S. 1881, there could be no subsequent modification thereof by parol; hence in an action by the seller based thereon, paragraphs of complaint on the theory that plaintiff's failure to deliver as provided by the contract was obviated by a subsequent oral agreement were insufficient.

*Napier Iron Works v. Caldwell, etc., Iron Works, 317, 320 (2).*

**SERVICES—**

Liability for surgeon's, see RAILROADS 9-11.

**"SICKNESS"—**

See WORDS AND PHRASES.

**SPECIAL DAMAGES—**

See SALES 8.

**STATUTES—**

See DESCENT AND DISTRIBUTION 2; HUSBAND AND WIFE 5, 10, 12, 15; MASTER AND SERVANT 12, 13, 22, 23, 38, 41; PLEADING 3; RAILROADS 2, 3; TAXATION 3.

1. *Construction.—Parts of Act.*—Sections 2990-2994 Burns 1914, §§2467-2471 R. S. 1881, of the statute of descent, are all parts of the act of 1852 (1 R. S. 1852 p. 248), and the language employed should be reasonably construed and meaning be given to all portions of the act where that can be done by fair and reasonable interpretation of the whole act. *Avery v. Vail, 99, 103 (1).*
2. *Remedial Statutes.—Construction.—Redemption from Judicial Sales.*—Statutes authorizing redemptions of real estate from judicial sales are remedial in character and, while strictly construed to determine the classes that come within their provisions, and the time for redemption, are liberally construed to make them effective as to those that come within their provisions. *Fort Wayne, etc., Supply Co. v. Pfeiffer, 615, 624 (4).*



**"STREAM OF WATER"—**

See WORDS AND PHRASES.

**STREET CARS—**

Stopping of, on signal, see CARRIERS 20.

**STREET RAILROADS—**

*Injuries to Persons on Streets.—Duty of Motorman.—Instructions.*

—In an action for injuries sustained in a collision with an interurban car upon a public street, an instruction that "a motorman operating an interurban car upon a city street, and seeing a person driving \* \* \* parallel to the track \* \* \* and not within dangerous proximity thereto, has a right to presume that such person will exercise reasonable and ordinary care and will not drive upon the track when said car is in dangerous proximity," and that "it is the duty of such motorman, if he sees such person approaching the track in a vehicle, to give warning of the approach of his car, if he has the time and opportunity in the exercise of ordinary care, and he may proceed without stopping the same upon the presumption that such person will not drive upon the track in front of his car when it is in dangerous proximity to said person and vehicle," though incomplete and not strictly accurate, was not fatally erroneous in view of other instructions given.

*Cullman v. Terre Haute, etc., Traction Co., 187, 188 (1).*

**STREETS—**

Collision on, see NEGLIGENCE 4-6.

Injuries to persons on, see STREET RAILROADS.

Ownership of fee in, see DEDICATION 1.

**"SUBMISSION"—**

See WORDS AND PHRASES.

**SUNDAY—**

One engaged in the assessing of property for taxation can not recover for incidental work performed by him on, see TAXATION 1-3.

*Statutory Provisions.—"Common Labor."*—The phrase "common labor" as used in §2364 Burns 1908, Acts 1905 p. 584, §467, prohibiting one from engaging in common labor or in his usual avocation on Sunday, includes the transaction of the ordinary business affairs of life.

*Stellhorn v. Board, etc., 14, 19 (3).*

**SUPPORT—**

Conveyance in consideration of, see DEEDS 1.

Deed given for, see CANCELLATION OF INSTRUMENTS 1, 2.

**SURETYSHIP—**

Of wife, see HUSBAND AND WIFE 6, 7.

**SURGEON—**

Employment of, see RAILROADS 8-11.

**TAXATION—**

1. *Assessment of Property.—Work Performed on Sunday.—Compensation.*—One engaged in the assessing of property for taxation

**TAXATION—Continued.**

can not recover for incidental work performed by him on Sunday in violation of §2364 Burns 1908, Acts 1905 p. 584, §467.

*Stellhorn v. Board, etc.*, 14, 22 (6).

2. *Assessment of Property.—Work Performed on Sunday.*—One employed to assess property for taxation, who devoted the Sundays embraced in the period from March 1 to May 15 in checking up and arranging his lists, was on such days engaged in a work incident to the work of assessing and hence engaged in his usual avocation within the meaning of §2364 Burns 1908, Acts 1905 p. 584, §467, prohibiting work on Sunday, and, in view of the fact that the public interests would not have suffered substantially had such work not been performed on Sunday, the work was not one of necessity, nor was it a work of charity, within the exceptions provided by the statute. *Stellhorn v. Board, etc.*, 14, 20 (4), 21 (4).
3. *Assessment of Property.—Work Performed on Sunday.—Statutes.*—Although there are seventy-five days including Sundays in the time allotted for the assessment of personal property as fixed by the act of 1903 (Acts 1903 p. 49, §10157 Burns 1908), and that act limited the time for which township assessors might receive pay to seventy-five days, while subsequent amendments provide that assessors should be paid for a time not exceeding such limits as may be fixed by law in any year, it can not be presumed that the legislature intended to authorize township assessors and their deputies to prosecute their work on Sundays, especially in view of §10272 Burns 1908, Acts 1903 p. 49, providing for the assessment of property after the time limited. *Stellhorn v. Board, etc.*, 14, 23 (7).
4. *Foreclosure of Tax Lien.—Sale.—Collateral Attack.*—Unless the sale of land had in pursuance to an order foreclosing the tax lien and directing the sale is void for some reason apparent on the record, a collateral attack can not be maintained.  
*Bliss v. Gallagher*, 454, 460 (1).
5. *Foreclosure of Tax Lien.—Sale.—Title Conveyed.*—The sale of property to satisfy the lien for taxes in favor of one who was the purchaser at a delinquent tax sale, made pursuant to an order foreclosing the lien and directing such sale in a proceeding to quiet title properly brought under §8640 Burns 1894, Acts 1891 p. 199, §222, and the execution of a deed in fee simple by the sheriff, carried to the purchaser a perfect title free from any claims of former owners.  
*Bliss v. Gallagher*, 454, 461 (3).
6. *Foreclosure of Tax Lien.—Sale Without Appraisalment.—Validity.*—Section 8640 Burns 1894, Acts 1891 p. 199, §222, relating to quieting title to land purchased at sales for delinquent taxes, and providing for the foreclosure of tax liens where the delinquent sale is ineffective to convey title, does not contemplate or require that an appraisalment of the land shall be had before offered for sale in pursuance to an order foreclosing the tax lien and directing a sale, and hence a sale without such appraisalment is not for that reason invalid.  
*Bliss v. Gallagher*, 454, 460 (2).
7. *Foreclosure of Tax Lien.—Parties.*—A sale of land in 1900 pursuant to an order foreclosing a tax lien and directing such sale was binding on the grantors of one asserting title as against the purchaser at such sale, notwithstanding such grantors were not parties to the foreclosure proceedings, where it appeared that, though at the time holding a deed from the one in whose name the land rested during the period in which the taxes for which it was sold accumulated, they neglected to record such deed until several years after the foreclosure sale, in view of the provisions of §8640 Burns 1894, Acts 1891 p. 199, §222, that no outstanding unrecorded deed shall be of any effect as against the title or right of a complainant as

**TAXATION—Continued.**

fixed and declared by the decree made in a cause thereunder, and of §3962 Burns 1908, §2931 R. S. 1881, that a deed not timely recorded shall be deemed fraudulent as against a subsequent purchaser without notice. *Bliss v. Gallagher*, 454, 461 (4).

8. *Tax Sales.—Quieting Title.—Statutory Provisions.—Right to Declare Lien.*—Under §8640 Burns 1894, Acts 1891 p. 199, §222, authorizing the purchaser of land at a sale for delinquent taxes to maintain a suit to quiet his title, the court in such a suit, if he finds such sale to have been insufficient to convey title, may declare the lien of the purchaser for taxes and penalty as valid, and order a foreclosure of such lien. *Bliss v. Gallagher*, 454, 462 (5).

**TERMINAL CARRIER—**

Liability of, see CARRIERS 10.

**TRACKS—**

Animals on, see RAILROADS 1-7.

Injuries to persons on, see RAILROADS 12-17.

**TRANSCRIPT—**

Filing of, see APPEAL 25.

Failure to comply with rule in preparation of, see APPEAL 39.

**TRESPASS—**

*Action. — Complaint. — Sufficiency.*—Where each paragraph of complaint was based upon a trespass committed by defendants' live stock upon the premises of plaintiff, an allegation of plaintiff's freedom from fault was not necessary, and, even if requisite, was supplied by the averment that plaintiff did all that he could to prevent the injury complained of. *Ward v. Perry*, 1, 6 (5).

**TRIAL.**

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| I. COURSE AND CONDUCT OF TRIAL IN GENERAL, 1, 2. | IV. INSTRUCTIONS, 7.            |
| II. RECEPTION OF EVIDENCE, 3.                    | V. VERDICT, 8, 9.               |
| III. DIRECTING VERDICT, 4-6.                     | VI. ANSWERS TO INTERROGATORIES. |
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**I. COURSE AND CONDUCT OF TRIAL IN GENERAL.**

1. *Exceptions to Conclusions of Law.—Admissions.*—Exceptions to conclusions of law admit for the purpose of such exceptions that the facts were correctly found. *Tuell v. Homann*, 285, 291 (3).
2. *Interrogatories to Jury.*—Under §572 Burns 1914, Acts 1897 p. 128, providing for the submission of interrogatories to the jury, interrogatories calling for a conclusion of law should not be submitted. *Pennsylvania Co. v. Reesor*, 636, 642 (3).

**II. RECEPTION OF EVIDENCE.**

3. *Objections to Evidence.—Evidence Admissible in Part.*—Where competent and incompetent evidence is blended together and offered as a whole, it is not error to sustain an objection to the whole. *Jose v. Hunter*, 569, 586 (9).

**III. DIRECTING VERDICT.**

4. *Announcement of Intention.—Right to Dismiss Action.*—Under §338 Burns 1914, §333 R. S. 1881, providing that an action may

**TRIAL—Continued.**

be dismissed without prejudice before the jury retires, or, if tried by the court, at any time before the finding of the court is announced, the plaintiff is entitled to a dismissal without prejudice on his motion made after the court has announced its intention to give a peremptory instruction for defendant and before the instruction is actually given. *Van Sant v. Wentworth*, 591, 592 (2).

5. *Duty of Court.*—Where it is clear from the evidence that a verdict, if returned for the party having the burden of the issue, can not stand, it becomes the duty of the trial court to direct the verdict. *Borg v. Larson*, 514, 518 (2).
6. *Province of Jury.*—Where the court directs a verdict it is not within the province of the jury to deliberate and determine what verdict shall be returned. *Van Sant v. Wentworth*, 591, 592 (3).

**IV. INSTRUCTIONS.**

See APPEAL 57, 121-124; CARRIERS 6, 8, 13, 20, 21, 26, 28; DAMAGES 1; FRAUD 2; LANDLORD AND TENANT 3; MASTER AND SERVANT 14, 18, 21, 23, 25, 28-30, 34, 42; NEGLIGENCE 1; RAILROADS 15, 17.

7. *Incomplete Instructions.—Duty to Request Proper Instruction.*—Where it occurs to a party at the time of trial that an instruction omits certain matters that might properly be included therein, it is his duty to request a complete instruction. *Cullman v. Terre Haute, etc., Traction Co.*, 187, 191 (3).

**V. VERDICT.**

See INSURANCE 1; MASTER AND SERVANT 19, 27, 36, 37; NEGLIGENCE 14.

8. *Effect.*—In a personal injury case, a verdict for plaintiff on a paragraph of complaint grounded on negligence is in effect a finding against plaintiff on a paragraph alleging wilful injury. *Pennsylvania Co. v. Reesor*, 636, 641 (1).
9. *Excessive Verdict.—Action for Compensation.*—Where the evidence showed that plaintiff worked for defendant as a farm hand during three seasons of eight months each, and one season of five months, for which he was to receive twenty dollars per month, and that he had been paid the sum of \$160, a verdict for \$420 in an action to recover the wages due was not excessive. *Dunton v. Howell*, 183, 186 (3).

**VI. ANSWERS TO INTERROGATORIES.**

See MASTER AND SERVANT 19, 36, 37; NEGLIGENCE 14

**VII. FINDINGS.**

See EASEMENTS 4, 9; EJECTMENT; HUSBAND AND WIFE 8, 13.

10. *Failure to Find Material Fact.*—The failure to find a material fact is the equivalent of a finding against the party upon whom rests the burden of proving such fact. *Shedd v. American Maize, etc., Co.*, 146, 163 (13).
11. *Sufficiency.*—Findings can not be aided by the conclusions of law, and to warrant a recovery by plaintiff every fact material to the cause must be found and stated, or must necessarily and clearly arise by inference from the facts found and stated. *Shedd v. American Maize etc., Co.*, 146, 163 (12).

**TRUST FUNDS—**

See **BANKS AND BANKING**.

**TRUSTS—**

Disaffirmance of, see **LIMITATION OF ACTIONS** 1.

**VACATION—**

See **DEDICATION** 2.

Appeal, see **APPEAL** 24.

**VENDOR AND PURCHASER—**

*Purchaser from Holder of Unrecorded Deed.—Notice.*—One purchasing from grantors whose claim or title, rested on a deed which they had held for nineteen years without placing it of record, was chargeable with notice of the condition of the record and the rights of one who in the interval had purchased the land at a sale held pursuant to the decree in a proceeding foreclosing a lien for taxes.  
*Bliss v. Gallagher*, 454, 463 (6).

**VERDICT—**

See **APPEAL** 71-74, 110-113; **TRIAL** 8, 9.

**WAIVER—**

See **APPEAL** 30, 31, 68; **INSURANCE** 6; **SALES** 14.

Of error, see **APPEAL** 51-53, 127, 128.

Of mechanic's lien, see **CONTRACTS** 2.

Of objections to appointment of special judge, see **JUDGES** 1.

**WARRANTY—**

Breach of, see **INSURANCE** 2-5.

**“WATERCOURSE”—**

See **WORDS AND PHRASES**.

**WATERS AND WATERCOURSES—**

Construction of, see **RAILROADS** 18-22.

Obstruction of, see **RAILROADS** 18-21.

1. *Natural Watercourse.—Obstruction.—Liability.*—Though a lower proprietor has no right to so construct a dam as to throw the water back on the premises of the upper proprietor in time of ordinary freshets, he is not liable for damages occasioned by extraordinary floods, against which ordinary skill and foresight would not provide, though the backing of the water is increased by such dam.

*Vandalia R. Co. v. Yeager*, 118, 129 (7).

2. *Natural Watercourse.*—Where the face of the country is such as to collect in one body so large a quantity of water after heavy rains and the melting of large quantities of snow as to require an outlet to some common reservoir, and such water is regularly discharged through a well defined channel made by the force of the water, and which is the accustomed channel through which it flows, and has flowed from time immemorial, such channel is an ancient natural watercourse.

*Vandalia R. Co. v. Yeager*, 118, 127 (6).

3. *Obstruction of Surface Water.—Liability.*—A landowner without incurring liability therefor may in a proper manner erect at his

**WATERS AND WATERCOURSES—Continued.**

boundary barriers to ward off surface water from his lands, but such rule does not extend to a case where a natural or prescriptive watercourse is obstructed or interfered with to the damage of another.  
*Vandalia R. Co. v. Yeager*, 118, 122 (1).

4. *Obstruction.—Continuing Temporary Injury.—Damages.—Review.*  
 —An assessment of damages in the sum of \$900 for the obstruction of a natural watercourse so as to overflow the land of plaintiffs was excessive, and also erroneous on the ground of double damages, where the obstruction was a continuing temporary injury in existence one year prior to filing the complaint, and the sustaining of the judgment required the consideration of depreciation of the rental value for three entire years, plus three years' interest on the estimated investment in the lands flooded.

*Vandalia R. Co. v. Yeager*, 118, 131 (9).

**WIFE—**

Injury to, see DAMAGES 1.

**“WILFULLY”—**

See WORDS AND PHRASES.

**WORDS AND PHRASES—**

“Approximately,” synonymous with “proximately,” see APPEAL 82.

“At once,” meaning of in connection with giving notice, see INSURANCE 13.

“Common labor,” includes the transaction of the ordinary business affairs of life, see SUNDAY.

“From time to time,” synonymous with “occasionally,” “at intervals,” “now and then,” see HUSBAND AND WIFE 13.

“Illness” and “sickness,” are synonymous, see INSURANCE 8.

“Intentionally,” is not synonymous with “wilfully,” see APPEAL 118.

“Natural watercourse,” is a channel cut by the force of its own running waters, see RAILROADS 20.

“Stream of water” and “watercourse,” distinction between is shadowy and unsubstantial, see RAILROADS 20.

“*Non sui juris*,” not necessary to be used in instruction, see NEGLIGENCE 1.

“Or,” is a disjunctive conjunction, see APPEAL 118.

“Party to be charged,” under the statute of frauds means the defendant to the action, see FRAUDS, STATUTE OF 2.

“Pending litigation,” meaning of, see ACTION 1.

“Submission,” meaning of, see APPEAL 26.

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